"THE NATURAL BRIDGE OF VIRGINIA"

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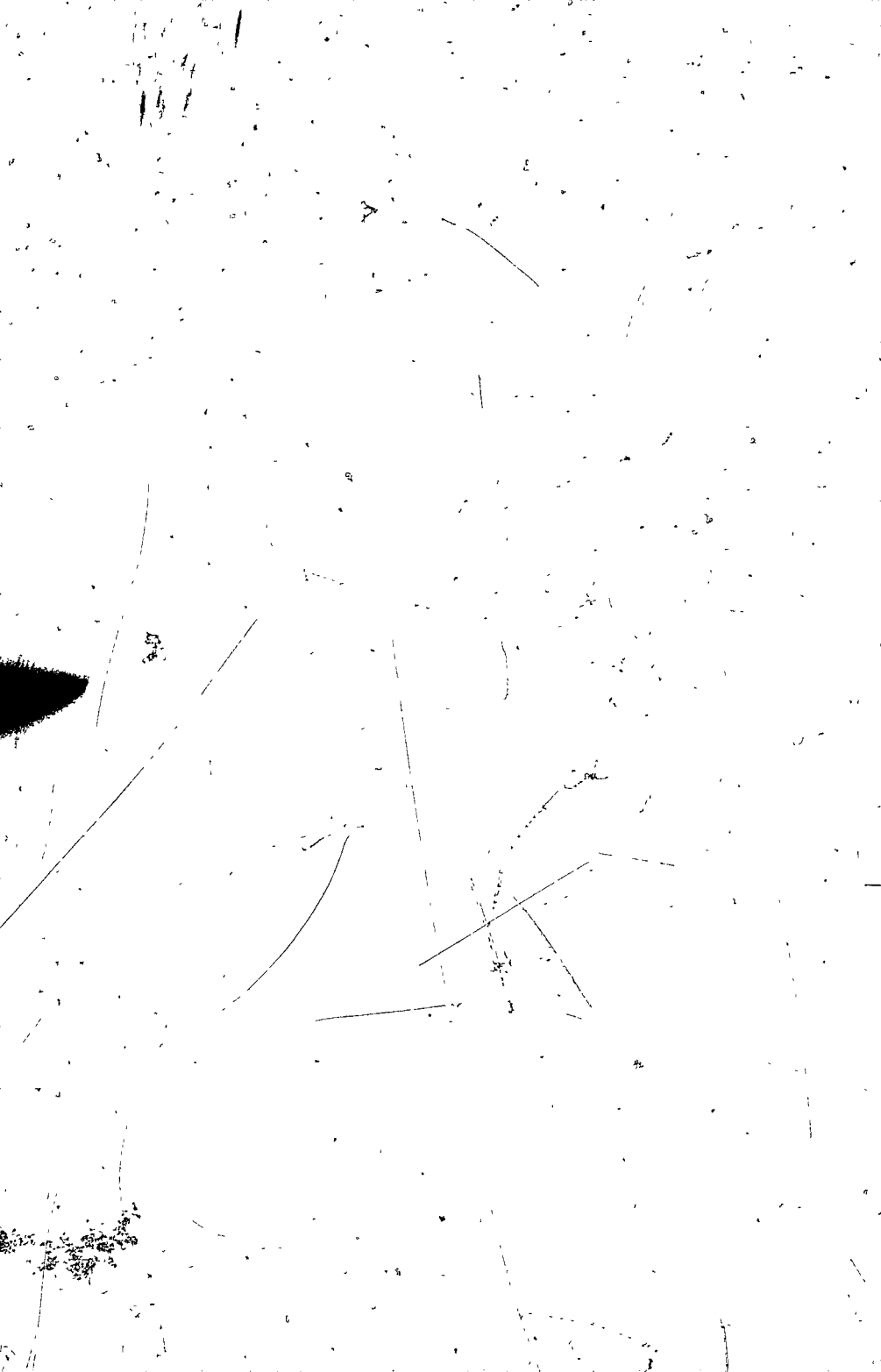

Winnipeg,
April 8th, 1880.

The Hon. J. H. Johnson,
Attorney-General of Manitoba.

Dear Sir,

I have to submit herewith the outline of the Historical Facts of Provincial Claims to the Natural Resources of Manitoba, prepared under your instructions of January, 1879.

It is almost unnecessary, perhaps, to add in case of publication that the views here presented on the points of historical investigation are my own and must be regarded in no way as attaching to the official views of responsible ministers under the Crown. Permit me, however, to express my thanks for your unfailing courtesy and for the very great kindness of the Premier and Education and staff in facilitating my work in every way.

I have the honor,

Your obedient servant,

JAMES H. MACKAY.

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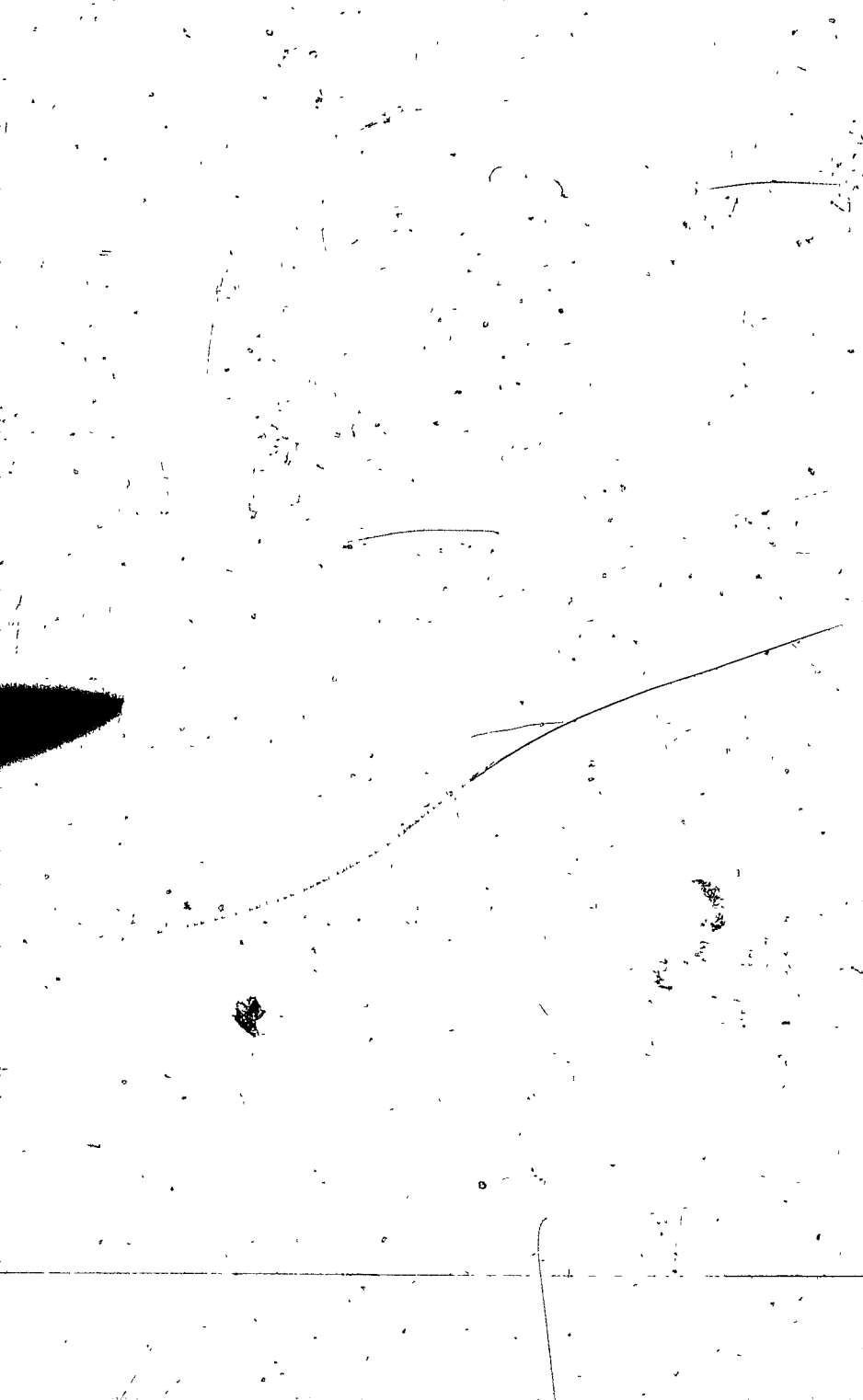

I.

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principle as applied to the period of her status as a Canadian province since 1870, and it may be stated briefly as a claim not to the unrestricted control of the natural resources within her boundaries hitherto maintained, but to the ample recognition of her full-fledged interests as a Canadian province and only to these but to those already attained by the Government of Canada for the purposes of the Dominion since Manitoba acquired self-governing provincial status in the Canadian Confederation.

In a very real sense, therefore, the issue is now as fundamental for this province as was the control of the clergy reserves or of the crown lands during the long controversy for responsible government in Upper Canada. In fact, it is largely the same issue: whether Manitoba is a colony or a province of the Dominion. In this the province is claiming no new principles. The issues which it raises are as old as responsible government. It will be seen that by virtue of the principles then established, all the original provinces of the Dominion acquired the full beneficial control of their public domain long before Confederation. These principles were recognized and perpetuated at Confederation by section 109 of the British North America Act of 1867, by which the beneficial control of the public domain was vested in the several provinces. The same principles, elsewhere applied, resulted in the beneficial control of public land by New Zealand, by Newfoundland and by the provinces of the Australian Commonwealth. In fact so fundamental and so widely recognized are these principles largely through the Canadian precedent after responsible government that in all the self-governing provinces and Dominions of the British Empire the Prairie Provinces of Canada constitute the only exception to their application. Even in the case of other provinces subsequently entering the Canadian Confederation, Manitoba remained for thirty-five years the solitary exception to the rule. In the case of British Columbia, the principles were applied as naturally and as normally that the issue was not even raised for discussion; while in the case of Prince Edward Island, the Dominion assumed obligations for which

it was in no wise comparable in order to endow the province with an equivalent for the public domain alienated by royal grants of the preceding century. For half a century now the Province of Manitoba has been contending for constitutional rights the denial of which was so exceptional as to be an anachronism even in 1870.

The present inquiry, therefore, may be simplified by confining very briefly at the outset the range of the historical evidence to be examined in the sections to follow:

(II.) As already indicated, the constitutional principles now invoked by Manitoba were established in the conflict for 'responsible government', and the historical background of that conflict is to be found not in Manitoba but in the Province of Canada three generations ago. It was in Canada, in fact, that those principles were first vindicated which have since become the common heritage of all British self governing communities. With regard to the public domain at least, it is in the case material here, that of the Prairie Provinces of Canada, that those principles have yet to be applied. As early as 1840 and 1847, as British public men, the Canadian Parliament received complete control of the lands which were situated in those provinces, and the plan adopted in every case of the grant of responsible government to the Maritime Provinces took the form of a grant of full rights over the lands in exchange for a civil list. Canada has not adopted the British ideas in dealing with the land in the new provinces. In the section (Chapter II) entitled British Principles with Regard to the Public Domain, an outline of these 'full rights over the lands' will be attempted in as brief a space as may be left to be consistent with the fundamental importance of the principles involved.

(III.) The conditions under which the Hudson's Bay chartered rights in Rupert's Land were surrendered to the Crown by the Hudson's Bay Company, and 'Rupert's Land' (together with the 'North Western Territory') united to

Canada by the Crown in 1870, were of a very exceptional nature. The constitutional procedure scrupulously observed in the process of transfer, however, left unimpaired the implications of that procedure for the new district 'as a part of the British Colonial System'.[1] There were exceptional conditions among others the payment of £300,000 attached to the preliminary surrender of chartered rights in Rupert's Land to the Crown, and it is safe to say that from these conditions many implications have been sought which are quite unwarranted by the facts. Similarly, the element of so called 'purchase' has served to conceal in the British constitutional procedure other implications which beyond reasonable doubt are warranted by the facts. In discussing (Chapter III) *The Surrender of Chartered Rights in Rupert's Land and the Transfer to Canada in 1870*, therefore, it will be necessary to examine this element of 'purchase' and the procedure observed in the surrender from the Hudson's Bay Company to the Crown and the transfer from the Crown to Canada.

(IV.) The circumstances under which Manitoba came into Confederation as a province were also very remarkable in that there was no previous period of territorial status. The same Imperial Order in Council which effected the transfer (in pursuance of the *B.N.A. Act* of 1867, section 146 and the *Rupert's Land Act*, 1868, section 6) effected also provincial status for Manitoba by bringing into operation the *Manitoba Act* of 1870. The conditions under which this Act was drawn up, however, were so exceptional that British principles were completely abrogated in connection with the public domain. The terms imposed upon the province by the Dominion provided for the administration of 'all ungranted or waste lands in the Province . . . by the Government of Canada for the purposes of the Dominion'. The circumstances which were held to warrant this contravent-

[1] Colonial Office to Governor-General, Nov. 30, 1869, quoted from Order in Council of the Province of Canada, June 23, 1870. *Correspondence connected with Recent Occurrences in the North West Territories*, Ottawa, 1870, p. 180.

tion of British practice will be discussed in the chapter upon 'The Transfer' and Provincial Status for Manitoba.

(V.) Within three years after the transfer of Rupert's Land from the Crown and the creation of the Province of Manitoba, two other provinces entered the Canadian Confederation. British Columbia in 1871 had passed through a development since 1849 which afforded in some respects perhaps the closest parallel to that of Rupert's Land. In both cases the surrender from the Hudson's Bay Company to the Crown had been accompanied by a monetary consideration, but whereas British Columbia came into Confederation with full beneficial control over her public domain, that over Manitoba was retained by Canada 'for the purposes of the Dominion.' The procedure followed in 1871 will be traced (Chapter V) in the outline of British Principles and Canadian Practice in British Columbia.

(VI.) The entrance of Prince Edward Island into Confederation in 1873 invites a similar discussion (Chapter VI) of British Principles and Canadian Practice in Prince Edward Island. In some respects the case of that province will be found to afford even a closer parallel and also a sharper contrast with Manitoba than that of British Columbia. The circumstances were exceptional, and the exceptional measures which were thus found to be necessary illustrate very clearly the principles involved. The belated subsidy 'in lieu of lands' to Manitoba in 1882 was granted 'as is done in Prince Edward Island.'

(VII.) The policy pursued by the Federal Government with regard to the public domain in Manitoba after 1870 affords a humiliating contrast to the British practices which obtained elsewhere in Canada and the Empire. This will be found to apply particularly to the Dominion's attitude of 'ownership' towards Manitoba as the 'property' of Canada, 'purchased,' 'possessed,' and 'administered . . . for the purposes of the Dominion.' This attitude is reflected even in the statutory basis for the federal administration of the public domain as devised in the Manitoba Act (afterwards

found to have been largely alienated and confirmed by the B.N.A. Act of 1871 [illegible] The immigration and railway policy of the Dominion burdened the province with intolerable obligations for local works and deprived the provincial treasury at the same time of all territorial revenues from which such expenditures have customarily been met. These conditions, culminating in the famous "Manitoba claims" with regard to the increased subsidy in lieu of lands in 1884, will be outlined in discussing Chapter VIII Federal Policy and Provincial Growth in Manitoba after 1870.

(VIII) The implications of the subsidy in lieu of lands in 1884, together with the understanding attitude of the Dominion government with regard to the whole issue of provincial rights over the public domain, will require special consideration in view of the renewal, by the Dominion Government, of assurances to purchasers by British principles and procedure. It will be found that Dominion precedents were not only persistently disregarded but were perverted in the process for thirty years in the attempt to justify the appropriation of public lands in Manitoba for the purposes of the Dominion. A discussion of this phase of natural policy will be found in the section, Chapter VIII, upon American Precedents for a British Province.

(IX.) The reader is asked to read carefully [illegible] rights and an outline of the general application of these to the "Natural Resources Question" as it may stand. This will be attempted in the closing section entitled "British Precedents in the Aboriginal Province of Canada".

This introductory outline is summarized below, and at the close of each section will be found a brief summary of the conclusions which seem warranted by the evidence. A recapitulation of these conclusions under the various captions outlined above is appended to this memorandum.

[illegible]

[illegible] in the following [illegible]:

(ii) British Principles with Regard to the Public Domain, as established in Canada [illegible]

(iii) The conditions determining the surrender of Indian Rights in Upper Canada and the [illegible] in Canada in 18[illegible]

(iv) The [illegible] of the [illegible] and [illegible] in Manitoba in 18[illegible]

(v) An examination of British Principles and Canadian Practice in British Columbia in 18[illegible]

(vi) A similar examination of British Principles and Canadian Practice in Prince Edward Island in 18[illegible]

(vii) [illegible] Provincial Rights in Manitoba after 18[illegible]

(viii) [illegible] American Precedents for a British Practice

(ix) An outline of the [illegible] British [illegible] principles, and their application to the [illegible] Question [illegible] British Principles in the [illegible] Provinces of Canada

[illegible]

[illegible]

of the two houses was vested in the Governor and Council, and framed regularly the subject of colonial administration both in the common law of the mercantile government and by detailed ordinances during the first decade from 1660 to 1670 [illegible] the period, and indeed long afterwards, the inhabitants and the lands were regarded as being vested in the Crown, as being granted by the Crown through duly accredited representatives [illegible] and authority to grant the same upon such terms ... and under such other conditions as shall appear to be to the necessity and expedient for the good and orderly government of those parts ... a royal prerogative, the grants in part of the general and ordinary of the Crown.

1688 Throughout the succeeding period, from the Constitutional Act of 1791 to the Act of Union, 1840, similar forms of colonial administration and control of crown lands remained. Despite calls to liberty through the increase the object of bitter and almost successful attack during the conflict for responsible government. The Constitutional Act itself specifically enumerated the Royal prerogative touching the granting of waste lands of the Crown within the said Provinces in the name and behalf of the same Act were made the well known provisions for clergy reserves which formed the chief question of responsible government in one of its most acute and embarrassing forms.

The powers nominally vested in the Governor acting with the advice of his Executive Council, derived in effect, however, entirely upon the Council which was empowered to administer the province entirely without responsibility to the Assembly. The interests of which were promoted, as

[illegible]

[illegible]

friends whom they desired to benefit, or it may be enemies whom they were willing to injure, the members of the Council almost uniformly exercised their powers for purely colonial purposes and for local or personal objects. The notorious position of Upper and Lower Canada by which the Home Government agreed to granting to a Council or promoter the grants of land which were made for the maximum area allowed by the land regulations nominally to themselves, was reduced to a system in Lower Canada until under one administration, that of Sir Robert Shaw Milnes, six members of the Executive Council who constituted the Land Board granted about 1,400,000 acres to fewer than 60 individuals. The Lower Canadian Assembly submitted that the management of the waste lands of the crown has been obstructive and improvident; and even the Select Committee of the British House of Commons on the State of the Civil Government of Canada in 1828 approved the principle of granting grants of land in large quantities to individuals who had held official situations in the Colony &c.

The control over the administration of the crown lands and the territorial interest therein, however, were still jealously retained in the name of the Crown. As late as 1851, the Canadian Revenue Control Act (14 & 15 Vict. c. 63) in granting the Assembly of the province the control of the taxes under the Quebec Revenue Act of 1774 (14 Geo. III, c. 88) specifically reserved the casual and territorial revenues of the Crown. The Governor, Lord Elgin, contended in that year (1851) that these revenues stand upon a perfectly different ground from taxes properly so called. They are enjoyed by the Crown, by virtue of the Royal Prerogative, and are neither more nor less than the proceeds of landed property, which legally and constitutionally belongs to the Sovereign on the throne &c. Until the Act of Union, in fact, the crown lands, as Charles Buller expressed it in his special

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Report on Public Lands and Immigration by Charles Buller to Lord Durham; Lord Durham's Report, pp. 140-141, 177-178.

Responsible Government of the Canadian Constitution, pp. 104-105.

Elgin-Grey, Lord Durham's Report, at Lxxvi, Lxx.

report to Lord Durham in 1838, were 'in name the property of the Crown, and under the control of an English minister, while the Assembly claimed that the administration of the Crown lands ought to be entrusted to ministers responsible to the Assembly, and that revenue arising therefrom ought to be under the control of the representatives of the people.'[a]

1840-1867 These claims were definitely conceded by the Act of Union, 1840, and by the practice of responsible government subsequently acted upon by British governors. In view of the importance of the principles involved, it may be advisable to trace briefly this final stage of the long controversy until it was definitely closed by Imperial enactment conceding specifically to self-governing provinces, the beneficial interest in the public domain, and the the administration thereof, as indispensable adjuncts of 'responsible government.'[b]

(a) Beneficial Interest. By the Act of Union, 1840, it is provided that 'all the territorial and other revenues now at the disposal of the Crown within the Province of Canada' should be surrendered to the consolidated revenue fund of the province in return for a fixed 'Civil List' of £75,000.[c] That is to say, it took here as elsewhere the form of a bargain or compact, the grant of territorial revenues in return for assuming the obligations ('Civil List') of self-government. A similar controversy had been going on, however, in Great Britain itself with regard to the surrender of what were called 'the casual and territorial revenues of the Crown' to the Imperial Parliament. This has been effected by Civil List Acts passed at the beginning of each reign for the lifetime of the sovereign.[d] Since, however, these 'casual and territorial revenues of the Crown' thus surrendered to the Imperial Parliament by the Civil List Acts, included them

[a] Lord Durham's Report, ed. Lucas, II. 107 ff.

[b] Ninety-two Resolutions, Lower Canadian Assembly, February 21, 1834.

[c] 3 & 4 Vict., c. 35, s. 52.

[d] 1 Will. IV, c. 25; 1 & 2 Vict., c. 2, s. 2.

[e] Similar Acts have been passed at the beginning of the reigns of Edward VII and George V: 1 Edw. VII, c. 4 and 10 Edw. VII & 1 Geo. V, c. 28.

effectually the territorial revenues from the crown lands of the whole Empire, it was deemed advisable definitely to terminate by Imperial Act all hereditary interest in those lands. This was effected in 1865 by 28 & 29 Vict. c. 104, which specifically excepted from the casual and territorial revenues of the Crown accruing to the consolidated fund of Great Britain through the Civil List Act all 'moneys arising from the sale or other disposition of the lands of the Crown by any of His Majesty's colonies or foreign possessions.' This Act (28 & 29 Vict. c. 104), therefore, marks the formal conversion of the demands of self-governing provinces to full hereditary interest in the public domain within their boundaries.

The Administration. The process of putting the principles of responsible government into practical operation was necessarily slow and tentative. It was not until the time of Lord Elgin that it became a settled policy on the part of the Governor-in-Council (the whole weight of responsibility on those who exercise the real power) in the administration of government, including the whole system of land granting, etc., thus devolved upon ministers directly responsible to an elective assembly, and the full parliamentary control of the public domain thus lodged a powerful ancient and indeed inestimable development.

Here again in its final stages, however, the principle is established and merely by precedent in self-governing provinces but by the express provisions of Imperial statute. Down to the Act of Union, 1840, the Majesty's prerogative touching the granting of waste lands of the Crown had been safeguarded by providing that Canadian bills relating thereto should be laid before both Houses of Parliament of the United Kingdom of Great Britain and Ireland before receiving the royal assent. By the Union Act Amendment Act of 1840 these provisions were repealed and the royal assent could then be given at once by the Governor to provincial bills relating to the public domain. This and many more like

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[1] 3 & 4 Vict. c. 35, s. 42.
[2] 14 & 15 Vict. c. 63, s. 3.

[illegible] to have completed the purchase of Indian title to [illegible] in Canada [illegible] Indian title to the [illegible] of the Indian administration of the [illegible] lands.

The Indian principle, therefore, of administration of Crown lands by parliamentary legislation and the employment of the civil [illegible] Indian Department have been [illegible] to take the place of the system of the Province of Canada, with the exception of the Province Peninsula [illegible] Indian Department. The Colonial Office, it will be seen, [illegible] the latter part of the principle with particular application to administration with the Hudson's Bay Company with regard to Rupert's Land. It is clear that [illegible] of the Imperial Government have been upon the local revenue as [illegible] to the expenses of the Indian department. The [illegible] of the public domain has been and must be a very [illegible] [illegible] of [illegible] are applied and pushed by their legal [illegible]. It [illegible] naturally and naturally to the [illegible], they [illegible] and the [illegible] of the Canadian Confederation. In such [illegible] it [illegible] the [illegible] of a [illegible], the [illegible] of the [illegible] of the public domain to retain the [illegible] and [illegible] of self government. Both in Canada and the Maritime Provinces the [illegible] adopted in [illegible] of the grant of responsible government, as [illegible] [illegible], was the [illegible] of a grant of full [illegible] over the lands in [illegible] to a [illegible].

One [illegible] of the question, indeed, in [illegible] of special consideration became it affects almost an equal [illegible] to the [illegible] of the Imperial Government in the administration of the public domain of Manitoba since 1870. [illegible] Indians through the appeals to responsible government in many other respects was [illegible] to [illegible] at that time [illegible] the [illegible] of new [illegible] [illegible] the [illegible] of [illegible] Waterfield

[illegible] relating to the surrender of Rupert's Land, 1869
[illegible] Government in the Dominion, 1871

and Charles Buller for Imperial administration and control of Crown lands.[1] Durham proposes that the entire administration of it should be controlled by an Imperial authority.[2]

Charles Buller, whose special report on Public Lands and Emigration formed the basis of Durham's recommendations, proposed that all revenues arising from this uniform and liberal system of colonization should be specifically appropriated to such [illegible] as would improve the value of land and facilitate the progress of settlement[3] and Lord Durham himself in recommending that all the revenues of the Crown should at once be given up to the United Legislature on the condition of an adequate civil list, specifically excepted those and those only which are derived from the public lands.[4]

It is significant that though Durham's scheme with regard to public lands in that formative period of colonial development was commended much attention, the proposal was still born and the territorial revenues of the Crown, as already noted, were handed over entirely to the Canadian Legislature. As [illegible] points out the proposed combination of the grant of responsible government with Imperial control over the public lands was in the nature of things impossible.[5] Even Buller had stated the alternative to Imperial control in terms which leave nothing to be desired.

> I am also bound to recommend, that in the event of such a course not being deemed expedient, the whole control of the property should be vested in the most [illegible] and unconditional manner in the Colonial Legislature. This is required by every principle of [illegible]

Durham's recommendations, therefore, with regard to perhaps the most elaborate and soundly based scheme of colonization ever devised, remained in Canada a dead letter. The principle of Imperial control by local legislatures was,

[1] Lord Durham's Report, ed. Lucas II, [illegible]
[2] Lord Durham's Report, ed. Lucas II, [illegible]
[3] Lord Durham's Report, ed. Lucas II, [illegible]
[4] Lord Durham's Report, [illegible]
[5] Lord Durham's Report, ed. Lucas I, [illegible]

responsible for carving in each of the original provinces of Confederation the rights over the public domain which they have enjoyed ever since, and the constitutional rights which they seek to deny to the Prairie Provinces in the twentieth century are they the same rights which they themselves negotiated even against the hostile of responsible government in other hands, Lord Durham himself during the last half of the nineteenth. The arguments employed against the parochial rights of the Prairie Provinces would have justified the words of one of the most eminent of Canadian constitutionalists on a very memorable occasion, the imposition by the Imperial government up to the present time of every piece of Crown lands in Canada."[1]

As already indicated, these recognized provincial rights were safeguarded in section 109 of the B.N.A. Act of 1867, and so well established were these principles that when British Columbia entered Confederation they were applied to that province automatically without even the formalities of parliamentary discussion.[2] In Prince Edward Island heavy obligations were voluntarily assumed by the Dominion in order to establish the Colony in a position as regards land tenure and territorial revenue, similar to that occupied by the adjoining Provinces.[3] For thirty-five years Manitoba remained the solitary exception to the general rule. The Prairie Provinces of Canada alone among the self-governing provinces and Dominions of the British Empire are still living in respect of our natural resources under 'colonial' conditions, in many respects more reactionary than those which prevailed a hundred years ago in the provinces of British North America. In 1840 the Crown lands, as Buller pointed out, were at least administered by residents of the province 'for

"In every one of the other provinces of [illegible] Dominion, it was the [illegible] for the people living in and developing any [illegible] part [illegible], and ought safely to be entrusted, the entire [illegible] of the public lands [illegible]." Sir Robert Borden, Hansard, 1906, p. 1484.

[1] See Chapter V.

[2] See Chapter VI.

purely colonial purposes' and 'for local or personal objects'[a] by statute which the Dominion imposed upon this Province against her will (as expressed on at least four occasions) in respect of public lands, in that natural resources of Manitoba are 'administered by the Government of Canada for the purposes of the Dominion'[b].

Canada, therefore (as Keith points out), 'has not adopted the British ideas in dealing with the land in the new provinces,' and the Dominion 'manages to control lands despite the existence of the provinces . . . in a way which would never have been possible to an Imperial power which had no direct share in the ordinary government of the country.'[c] Despite our representation in a federal capacity at Ottawa, half a century has passed since British 'rights' to the 'full control of all the public land' were claimed for the 'Local Legislature.' Manitoba has exercised self government with a 'civil list' for fifty years without receiving, according to British practice, 'full rights over the lands in exchange.' The beneficial control of the public domain is implicit in full provincial status under responsible government, yet the fundamental British principles upon which the historic claims of Manitoba as a Canadian province since 1870 are based, have yet to be applied or even conceded to this province in anything like their logical entirety.

SUMMARY.

1. The claim to (a) the administration of the public domain, (b) the beneficial interest therein, formed an integral part of the conflict for 'responsible government' in Canada.

2. Both these functions were definitely conceded more than twenty-five years ago to provinces under 'responsible government,' Imperial beneficial control being definitely renounced by statute (15 & 16 Vic., c. 39 and 17 & 18 Vic., c. 118).

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a. Lord Durham's Report, ed. Lucas, III, 37-38.
b. See Chapter IV.
c. Manitoba Act, 33 Vic., c. 3, s. 30.
d. Responsible Government in the Dominions, II, 1064, 1053.

both functions, therefore, were implicit in provincial status for all the original provinces of Canada.

3. When these provinces united to form Confederation these rights were confirmed in *B. N. A. Act*, 1867, s. 109.

4. Similarly in Newfoundland, New Zealand, the provinces of the Australian Commonwealth, the same principles are uniformly in operation. 'Colonists of the Anglo-Saxon race look upon the land revenue as legitimately belonging to the community.' (*Colonial Office*, 1864, re Rupert's Land).

5. 'The plan adopted in every case of the grant of responsible government . . . took the form of a grant of full rights over the lands in exchange for a civil list' (*Keith*), viz. a compact involving the grant of the beneficial control of the public domain in return for undertaking the obligations of self-government. Manitoba has discharged the duties of 'responsible government' with full 'civil list' since 1870 and has been dolled for fifty years 'full rights over the lands in exchange.'

6. Even Lord Durham's proposals with regard to Imperial control of crown lands for purposes of scientifically directed colonization were still-born in Canada, and the only alternative was that 'the whole control of the property should be vested in the most ample and unconditional manner in the Colonial Legislature. This is required by every principle of justice.' (*Buller*).

7. The constitutional rights which the original provinces of Confederation now seek to deny to the Prairie Provinces in the twentieth century are the same rights which they themselves vindicated, even against Lord Durham, during the first half of the nineteenth. 'The arguments employed against the provincial rights of the Prairie Provinces would have justified the retention by the Imperial government up to the present time of every acre of Crown Lands in Canada.' (*Sir Robert Borden* in 1908).

8. In respect of public lands, Manitoba is still a 'colony' of the Dominion, with this difference for the worse, that whereas the crown lands before 'responsible government' were administered by residents of the province 'for purely colonial purposes' and 'for local or personal objects' (*Buller*) those of Manitoba are administered, by Dominion statute, 'by the Government of Canada for the purposes of the Dominion.'

III

THE SURRENDER OF CHARTERED RIGHTS IN RUPERT'S LAND

AND THE

'TRANSFER' TO CANADA, 1870.

The reluctance of the other provinces of Canada to concede to the Prairie Provinces the status which they themselves have always enjoyed has been defended and in some quarters seems to be defended still upon the contention that 'Rupert's Land' and the 'North-Western Territory' were 'purchased' from the Hudson's Bay Company and thus became the 'property' of Canada, to be administered 'for the purposes of the Dominion.' The evidence in the case indicates that this view is not warranted by the facts, and that the contention based upon that view has no parallel in British constitutional practice. The negotiations preceding the transfer form a very intricate and complicated process, but the transfer itself would seem to have been effected with scrupulous regard for sound constitutional procedure. The principles involved may perhaps be outlined for all practical purposes by examining (a) the nature of the so-called 'purchase,' (b) the actual procedure, and implications of that procedure, involved in the surrender of the Hudson's Bay Charter rights over 'Rupert's Land' to the Crown and the transfer of both 'Rupert's Land' and the 'North-Western Territory' by the Crown to Canada.

(A)—The Nature of the 'Purchase.'

The extension westward of the Province of Canada, and after 1867 of the Confederated Dominion, had long been generally accepted in Great Britain and in Canada, and even at the Red River Settlement, as an inevitable development. In 1857 the Select Committee of the British House of Commons in their famous *Report* recommended that 'the

districts on the Red River and the Saskatchewan should be handed to Canada by arrangements as between Her Majesty's Government and the Hudson's Bay Company. To do this, the British North America Act, 1867, section 146, provision is made:

> "On addresses from the Houses of Parliament of Canada to admit Rupert's Land and the North Western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act."

Pursuant to this section of the B.N.A. Act of 1867 a joint address of the Canadian Senate and House of Commons was passed December 16 and 17, 1867, praying to be allowed to assume the duties and obligations of government as regards those territories and urging the formation therein of political institutions bearing analogy, so far as the circumstances will admit, to those which exist in the several provinces of the Dominion.

As early as 1863, however, the Hudson's Bay Company expressed a willingness to have the Red River district handed over to Canada. In the preceding year the control of the Company had been purchased by the International Financial Company, and caused the negotiations in connection with the introduction of the direct authority of Her Majesty's Government into Rupert's Land, with the retention of an extensive proprietary control of the land by the Hudson's Bay Company, to be chiefly upon this basis that the Colonial Office refused to entertain the proposal, and the

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Report from the Select Committee on the Hudson's Bay Company, etc. etc. together with the M.S. Company dated March 17, April 6 and June 6, 1857, Letter from the Colonial Office and April 15 and December 7, 1857, from the Company. The compensation should be derived from the future receipts of the lands, and of any sale which may be effected in Rupert's Land, coupled with reservation of defined portions of land to the Company.

Correspondence relating the the surrender of Rupert's Land by the Hudson's Bay Company and for the Admission thereof into the Dominion of Canada, 1869, p. 22.

that reasons are stated in very explicit terms by the Colonial Office to the Colonial Office.

> In my despatch [illegible] I have stated my objections to [illegible] of government and management, and the whole progress of the Colony depends on the [illegible] and peaceful disposal of the land.
>
> It is clear that advantage of the Company must [illegible] upon the land remains as [illegible] to the Colonists [illegible]

When negotiations were resumed, therefore, in 1869, with a view to uniting Rupert's Land [illegible] the newly formed Canadian Confederation, the matter of compensation was patently retained by the Company; but the basis was altered to the payment [illegible] of a sum of [illegible] money, the sum of one million sterling, in lands being maintained by the Company as a settlement which might be acceptable to the [illegible] The Company insisted, however, upon [illegible] Act of Parliament to guarantee this compensation for the surrender of Charter rights to the Crown, because section 146 of the B N A Act of 1867 would have left the claims of the Company at the mercy of Canadian courts. It thus came to pass that the instrument under which the surrender was effected was the Rupert's Land Act, 31 & 32 Vict. c. 105, which, as the Canadian delegates, Sir George E Cartier and the Hon. William McDougall, protested, was not introduced at the instance or passed in the interest of the Canadian Government, and behind the Rupert's Land Act, beyond a doubt, certain monetary considerations had already begun to appear.

Here it cannot be emphasized too strongly that Canada contributed [illegible] for the transfer of Rupert's Land to Canada by Imperial Order in Council pursuant to the

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[illegible] correspondence relating to the Surrender of Rupert's Land, 1869, Appendix III, p. 64.

Select Bibliography to Colonial Office Papers, p. 64, Correspondence relating to Surrender of Rupert's Land, p. 64.

ibid. p. 81.

ibid. p. 46.

[illegible] memorandum [illegible] the Canadian delegates and approved by the Canadian Privy Council, [illegible], expressed

[illegible] the Canadian Government, that it is [illegible] the transfer which the Imperial Government has authorized, and the Canadian [illegible] approved, should not be delayed by [illegible] with regard to third parties [illegible]

[illegible] the Hudson's Bay Company [illegible] the Canadian Privy Council, [illegible] the Queen and the transfer by Her Majesty to the Dominion. [illegible] Imperial Government [illegible]

[illegible] through [illegible] the Hudson's Bay

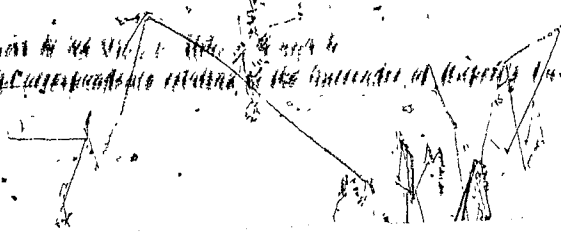
[illegible]

[illegible]

Company. That the above transaction was effected by the H.B.A. Act, 1867, against the above the Company granted that their proprietary rights should have been left as the money of Canadian Claims. The new Act, therefore, the Rupert's Land Act, 1868, provided specifically for the surrender of all Charter rights in Rupert's Land to the Crown upon such terms that Canada as might be agreed upon by and between Her Majesty and the said Governor and Company, and the said Imperial Order in Council should think, then a Date to be therein mentioned, on which Rupert's Land should be admitted into and become a Part of the Dominion of Canada. It is immediately that the second of those provisions merely extends the H.B.A. Act, 1867, to the whole Canada that was agreed to all the Act in the first. The new Canadian Delegates had no time to consider that that

> "That had it be the Colonies was not intended at the Instance of persons in the interest of the Canadian Confederation, should the negotiations of the terms of surrender by the Company to the Crown in the Queen of Her Majesty's Government should ... we are of opinion it would ..."

It was therefore provided by these two Acts of which Canada became possessed in the matter of Confederation of the Hudson's Bay Company for the surrender of Charter rights to the Crown. The Commission was drawn into the mandatory powers between the Canadian Government and the Rupert's Land Act. That provision was established by the Queen of Canada, but which is reached the Queen of Canadians, Canada's Confederation for the surrender of Charter rights by the Company and the Canadian of the Hudson's Bay for Her Majesty's Royal Assent and Charter with Canada and Canadians as might be agreed upon by and between Her Majesty and the said



Governor and Company') was amended by the addition of the following explicatory proviso

> 'provided further that no Charge shall be imposed by such Terms upon the Consolidated Fund of the United Kingdom.'[1]

It became obvious, therefore, that if a pecuniary compensation 'in hard money' was a sine qua non of the surrender of the Hudson's Bay Charter rights in Rupert's Land to the Crown, and if the transaction was to involve 'no Charge upon the Consolidated Fund of the United Kingdom,' it would be necessary for Canada to undertake the indemnity to the Hudson's Bay Company. This was undertaken by the Canadian delegates under protest and without waiving the rights of direct cession from the Crown. The sum of £300,000, it was stated by the Canadian delegates Carling and McDougall to the Colonial Office, February 8, 1869, was regarded by them as a species of settlement by compromise (as it was). The

> cost of legal proceedings necessary, if any, be necessary, to secure possession. Compromises of this kind are not unknown in private life, and the motives and calculations which govern them may be applicable to the present case.'[2]

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[1] Hudson's Bay Company Bill (H.L.)
Commons Amendment. Ordered to be printed, 23rd July, 1868.
The Rupert's Land Act received the royal assent, July 31, 1868.

[2] Report of Delegates appointed to negotiate for the Acquisition of Rupert's Land and the North West Territory, Ottawa, 1869.
This report was formally approved by Canadian Order in Council, on May 11, 1869.

The negotiations are remarkable for the precision and accuracy of the [illegible] Hudson's. The only lapse on the part of the Colonial Office would seem to have taken place during a pressure when the negotiations had ceased to look down altogether. Even here the argument of the Order in Council is found to be spurious to the point of disingenuousness. The Canadian delegates were pressing for the immediate [illegible] of the Government of the whole territory, while the Company was [illegible] for the payment of £300,000 in 'hard money' in London. The Colonial Office, convinced behind the amendment to the Rupert's Land Act providing that 'no Charge shall be imposed upon the Consolidated Fund of the United Kingdom,' was in a position to declare all responsibility in that respect. In reply to the language of the

The terms were finally drawn up categorically by the Colonial Office and offered by the Colonial Secretary to the Hudson's Bay Company on March 9, 1869, 'not . . . as a basis of further negotiation, but a final effort to effect that immediate accommodation, of which he has almost despaired.' These terms[1] were accepted by the Company on April 9 and ratified by a joint address of the Senate and House of Commons of Canada on May 29 and 31, 1869, on the recommendation of the Canadian delegates.

Whatever monetary and proprietary considerations were necessary, therefore, in order to effect the transfer, it is seen that, both in theory and in fact, the surrender of the Hudson's Bay Charter rights in Rupert's Land to the Crown was the only part of the transaction which involved 'compensation' of any kind. This surrender was formally signed and sealed by the Company on November 19, 1869; it was formally accepted by Her Majesty 'under the Sign Manual and Signet' on June 22, 1870, and the transfer of Rupert's Land to Canada did not take place until July 15. The payment of the £300,000, though stipulated in the terms to be paid 'when Rupert's Land is transferred to the Dominion of Canada' was made, as a matter of fact, on May 11, thus synchronizing with the receipt of the deed of surrender by the Colonial Office. The sum of £300,000 which was to be

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counting-house, the Under Secretary, Rogers, confronted the Company in their demands for 'one million sterling, in bonds' with the uncompromising, not to say truculent, attitude of the Canadian delegates:

'You propose that the matter should be settled by the immediate payment of a fixed sum of money, or by the delivery of bonds . . . It is, to some, obvious that this negotiation for the purchase of the Hudson's Bay Territory is really between the seller and the buyer, the Company and the Colony . . . Her Majesty's Government can merely offer to act as a channel of accommodation between these two real parties to the transaction.' Rogers to Northcote, February 22, 1869, *Correspondence relating to the Surrender of Rupert's Land*, 1869, p. 47.

[1] As a matter of fact, the terms, as stated above, were drawn up categorically by the Colonial Office, and the *Rupert's Land Act* had definitely provided 'such Terms and Conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company.' 31 and 32 Vic., c. 105, s. 3.

[2] *Correspondence relating to the Surrender of Rupert's Land*, 1869, p. 40.

raised by loan guaranteed by the British Rupert's Land Loan Act (32 & 33 Vict., c. 101), was there specified as 'for the purpose of payment to the Hudson's Bay Company on the surrender of Rupert's Land,' and the Company was authoritatively informed that 'the indemnity of £300,000 will be paid on due proof of the completion of their surrender.' The payment of the £300,000 was thus ascertained not by the transfer of Rupert's Land to Canada, for that was effected, it will be seen, by full cession from the Crown; it was exacted by the Hudson's Bay Company as a *sine qua non* for the surrender of their Charter rights in Rupert's Land.

It may thus be contended that the object of both Canada originally and the British Government was not to perpetuate the old system of proprietary administration, the only difference being that it should be continued 'for the purposes of the Dominion' instead of for the purposes of the Hudson's Bay Company, but rather to extinguish altogether the old disabilities under the Charter of the Company in Rupert's Lands by 'its settlement', as the Colonial Secretary pointedly emphasized, 'as a part of the British Colonial System.' In fact the whole transaction would seem to have been expressed nowhere more succinctly than by the Canadian delegates themselves:

> "The surrender of the powers of government and of territorial jurisdiction by the Company to the Crown, and the transfer of these powers to the Canadian Government, are acts of State, authorised by Imperial Statute, and will have all the force and permanence of fundamental law."[a]

Under circumstances such as these, the indemnity of

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[a] By the agents of Canada, Messrs. Dorion and Cartier. *Correspondence connected with the Recent Occurrences in the North West Territories*, 1870, p. 130.

[b] "Upon the Acceptance by Her Majesty of such Surrender, all Rights of Government and Proprietary Rights, and all other Privileges, Liberties whatsoever, granted to the said Governor and Company within Rupert's Land shall be absolutely extinguished." *Rupert's Land Act*, 1868, section 4.

[c] *Correspondence relating to the Surrender of Rupert's Land*, 1869, p. 16.

£300,000 by the Hudson's Bay Company, though paid by Canada, nevertheless entitled the Province to appropriate without accountability the public domain of Manitoba for the purposes of the Province, to deprive the inhabitants of this province, as a part of the British [illegible] system, of full rights over the lands in exchange for a cash [illegible] than the indemnity paid by Great Britain to the above-named in 1869 entitled the Government to retain the slaves in a state of perpetual bondage to the nation.

It may be pointed that the West is not the property of Canada since the public domain is vested in the Crown, [illegible] and that the £300,000 was not paid by the rest of Canada for the West in any case. It was paid immediately by British bankers, and the amount was subsequently raised by Canada (including Manitoba) by public loan guaranteed by British Treasury Warrant of June 18, 1870, pursuant to the Rupert's Land Loan Act, the principal to be repaid on 1st April, 1884.[1] The per capita contribution of Manitoba to Canadian customs revenues was for many years the highest in Canada,[2] and thus even at the current conception of the status of Manitoba as largely prevalent in Eastern Canada, this province may be said to have discharged rather more than her share of the 'purchase' price of her own public domain.

(iii) The Inception and Its Implications

In order to trace this procedure consecutively it would be necessary to outline the Acts, Joint Addresses, Imperial Orders, official reports, Orders in Council, etc. (some fifteen in number) by which the surrender of the Hudson's Bay

[1] 31 Vict., c. 3, s. 30, 4 & 5 Edw. VII, c. 3, s. 61, 4 & 5 Edw. VII, c. 42, 31 Vict., Report, Responsible Government in the Dominions, I, 110, etc.

[2] 33 & 34 Vict., c. 101. The Statement of Proceedings taken by the Lords Commissioners of Her Majesty's Treasury to give effect to the Guarantee of a loan for the £300,000 authorized by the Act 32 & 33 Vict., c. 106. June 28, 1870.

[3] Historic changing Terms on which the Dominion Lands [illegible] were negotiated in London. Can. Sess. Papers, 1880, vol. 4, Paper No. 7a Memoranda and Statements prepared by the Hon. the Provincial Treasurer of Manitoba, 1884, p. 11

Charter rights in Rupert's Land to the Crown and the transfer of 'Rupert's Land' and the 'North Western Territory' from the Crown to Canada were actually effected. The nature and significance of these, however, may be summarized in general terms without unnecessary detail.

It may be stated at once that scrupulous regard for sound British constitutional precedents was observed throughout the difficult process of transfer, and that the negotiations and final settlement bore the British principles with regard to self-governing dominions and above all, with regard to Manitoba which was entrusted with provincial status from the first in full terms and operation.

There were, as already pointed out, two distinct transactions involved. The surrender to the Crown of the Hudson's Bay Charter rights in Rupert's Land, involving the surrender of all or any of the lands, Territories, Rights, Privileges, Liberties, Franchises, Powers and Authorities whatsoever granted ... to the said Governor and Company within Rupert's Land, or was the only part of either transaction which involved 'compensation.' The second transaction was the transfer by Imperial Order in Council (June 23, 1870) to the Crown in Canada, not only of 'Rupert's Land' (which could be called only after the surrender of the Hudson's Bay Charter rights thereto) but of the 'North Western Territory' which was not within the Chartered territory of the Company and could, therefore, be ceded by the Crown without a preliminary 'surrender.' The statutory basis of the first of these transactions was the Rupert's Land Act, 1868, that for the second was the B.N.A. Act, 1867, section 146 which was reiterated in the Rupert's Land Act, section 5, in respect of 'Rupert's Land.' It ought to be noted that the 'Address from the Houses of Parliament of Canada,' required by both Acts should include the 'Terms and Conditions' ... agreed upon by and between Her Majesty and the said Governor and Company.' Pursuant to these two Acts the deed of surrender from the Company to the Crown is dated November

Rupert's Land Act, 1868, section 5.

1912. This surrender was formally accepted by Imperial Order in Council on June 28, 1912, and another Imperial Order in Council of June 28, 1912, provided for the transfer to Canada to take place on July 15, 1912. In all these documents, and particularly in the Imperial Order in Council of June 28, 1912, assuming the boundary there would seem to be nothing more unambiguously precise than the distinction between the territories to His Majesty's full the Province ... Provinces, Islands and Territories of the Province of Ontario, and the Province of Quebec and the Province of Nova Scotia and the Province of New Brunswick, and the Province of Prince Edward Island and the North Western Territory (the latter without Islands and Boundaries) to be annexed into and become part of the Dominion of Canada on

With regard to the North Western Territory, therefore, it is to be noted that although the Committee was prepared without any Islands and Boundaries whatsoever by way of Confirmation to the Company. By the terms of the Rupert's Land Act it is seen that such Terms and Conditions as shall be agreed upon by and between His Majesty and the said Company shall apply exclusively to the Surrendered Lands, Territories, Rights, Privileges, Interests, Properties, Powers, and Authorities thereby granted by the said Letters Patent. The Charter of 1670 to the said Governor and Company within Rupert's Land is. The whole area outside Rupert's Land, therefore, must be regarded as coming to Canada by direct cession from the Crown, pursuant to the B.N.A. Act, 1867, whether the said without even the barest appearance of preliminary formalities. As early as April 26, 1869, in fact, when the Rupert's Land Act was first proposed, the Colonial Secretary wrote to the Governor-General of Canada that

[illegible] and terms of the proposed vested in His Majesty by the said Act of Parliament. The said North Western Territory shall be admitted into and become part of the Dominion of Canada, and, it is further agreed that Rupert's Land shall be admitted into and become part of the said Dominion of Canada upon the below-mentioned terms and conditions

[illegible]

land, surrendered upon 'Terms and Conditions' in 1870, was subsequently included in the Provinces of Ontario and Quebec; in both cases the new territory was added by federal statute, and in both cases the provinces assumed automatically full beneficial control over the land. Perhaps the most anomalous transaction of all was the granting of the 'railway strip,' through Manitoba to Port Nelson, to Ontario at the *Manitoba Boundaries Extension Act* of 1912, the full rights of property therein being granted to Ontario while the land itself lies within the boundaries of Manitoba. Both 'chartered' and 'granted' territory ceded to Canada by the Crown in 1870 may, without impropriety be placed beneath the beneficial control of any province. It would seem, but Manitoba, Saskatchewan and Alberta.

By the constitutional procedure scrupulously followed in the transfer, therefore, both 'Rupert's Land' and the 'North Western Territory' came to Canada not from the Hudson's Bay Company by 'purchase' but from the Crown by 'Acts of State authorized by Imperial Statute,' with 'all the force and permanence of fundamental law.' There were weighty considerations of national policy in 1870 for retaining federally a large measure of federal control over these lands in order to facilitate immigration, etc., but the phrase 'in the language of the Transfers' in the *Manitoba Act* has now attained far more than fifty years an unwarranted violation of fundamental British principles. In British Columbia, it will be recalled, where the Hudson's Bay Company's rights by Letters Patent of January 13, 1849, in Vancouver Island had really been 'purchased' in 1867 by the British Crown from the Company, there was no attempt at retrocession by appropriating the beneficial interest in the public domain 'for the purposes of Great Britain.' British Columbia entered Confederation in 1871 with the full beneficial control of Crown lands in the province. No prior additions of territorial

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[illegible] Correspondence relating to the surrender of Rupert's Land, 1869 p. 10 [illegible] Canada and Papers laid before the Parliament of Canada, 1869.

16 and 17, 1867, the Canadian Houses of Parliament undertook to deal with the native population of Rupert's Land 'in conformity with the equitable principles which have uniformly governed the British Crown' Similar obligations, advocated by a Canadian Order in Council and enjoined by the Colonial Office, may be held to obtain with regard to this province 'as a part of the British System' since 1870.

SUMMARY

The reluctance of other provinces to concede to Manitoba the status in respect of public domain which they themselves have always enjoyed has long been defended upon the claim that Rupert's Land was 'purchased' from the Hudson's Bay Company and became therefore the 'property' of Canada

(A) The Nature of the 'Purchase'

1 The HBC prepared in 1861 to recognize a Crown Colony in Rupert's Land provided the Company retained exclusive proprietary control of the land

2 This proposal was refused by the Colonial Office because 'colonists of the Anglo-Saxon race look upon the land as a legitimately belonging to the community'

3 The HBC therefore demanded (1863-4) 'the payment, in compensation of a sum of hard money' for the surrender of their chartered rights.

4 Canada however resolutely urged direct cession by the Crown (in the BNA Act 1867, s 146) 'without negotiations with any third party in the case' Even when agreement for surrender of chartered rights became necessary, Canadian delegates regarded it as the 'cost of legal process necessary to recover possession' Confiscation of rights of 'rebels' as the official view of Canadian Government

5 Insistence of HBC on monetary compensation led to the *Rupert's Land Act* 1868 providing

(a) 'Surrender of all rights under the Charter in Rupert's Land to the Crown upon such Terms and Conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company'

(b) Union with Canada by Imperial Order in Council on address of Parliament of Dominion (Sec 146)

6 Canada was forced into this monetary transaction by amendment to the *Rupert's Land Act* in the House of Commons, by proviso that 'no Charge should be imposed by such Terms upon the Consolidated Fund of the United Kingdom'

7 Canada, therefore, was forced to indemnify the H.B.C. for the surrender of chartered rights in Rupert's Land to the Crown, and this was the only part of either transaction involving 'compensation' of any kind

8 Object of whole transfer was not to perpetuate proprietary administration 'for the purposes of the Dominion' but that the old 'Proprietary Rights,' etc., of the Company should be 'absolutely extinguished' (*Rupert's Land Act*) in order to expedite 'settlement as a part of the British Colonial System' (*Colonial Office*).

9 The transfer from the Crown to Canada by Order in Council, therefore, was by cession with 'all constitutional implications unimpaired' 'the surrender by the Company to The Crown and the transfer to the Canadian Government, are Acts of State, authorized by Imperial Statute, and will have all the force and permanence of fundamental law' (*Canadian delegates*)

10 The £300,000 was raised by loan, guaranteed by the British Government, 'the principal to be repaid on 1st April, 1901'

(B) The Procedure and its Implications

1 Two distinct and fundamental transactions were involved

(a) surrender of the Hudson's Bay Charter rights in Rupert's Land to the Crown 'upon such Terms and Conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company.

(b) cession of 'Rupert's Land' and North Western Territory to Canada by Imperial Order in Council of June 23, 1870

2 The statutory basis of (a) was *Rupert's Land Act*, that of (b) was *B.N.A. Act*, 1867, section 146, reiterated in *Rupert's Land Act* section 5

3 The surrender of chartered rights in Rupert's Land by the Hudson's Bay Company to the Crown was dated November 19 1869; the surrender was received by the Colonial Office and £300,000 paid on May 31, 1870, the

surrender of chartered rights was formally accepted by the Crown by Order in Council of June 23, 1870. Rupert's Land and North Western Territory united to Canada on July 15 by Imperial Order in Council of June 23, 1870.

4 The Terms and Conditions including Compensation provided for in the Rupert's Land Act apply exclusively to Rupert's Land. The whole area outside Rupert's Land (the North Western Territory) therefore must be regarded as coming directly to Canada from the Crown by transfer under B.N.A. Act 1867, section 146, and without even the initiation of preliminary 'purchase'. This is clear from the correspondence of the Colonial Office at the time of the Rupert's Land Act. The attitude of the Canadian Government at

5 Mainland district of British Columbia already vested (under old act of mixed territory—in same relationship to H.B.C. as North Western Territory—and full beneficial control of public domain was vested in B.C. in 1871

6 Similarly, all title from the chartered territory of Rupert's Land was vested both in Ontario and in Quebec with full beneficial control vested in those provinces despite so-called purchase by Canada in 1870 from within boundaries of Manitoba. Ontario was granted property rights over railway belts by Privy Council in the Manitoba Boundaries Extension Act of 1912

7 Manitoba, Saskatchewan and Alberta appear to be the only provinces of Canada which entered by entrenched with beneficial control over, rather than beneficial or 'chartered' control of the H.B.C. vested in Canada in 1870

8 By the constitutional precedents completely followed in the Dominion Lands Act, both Rupert's Land and the North Western Territory came to Canada not from the H.B.C. by purchase but from the Crown by Act of State, authorized by Imperial Statute with all the force and permanence of fundamental law

9 In 1871 British Columbia got Dominion Government land subsidy and public domain both instead of beneficial control over public domain which has been vested in H.B.C. and Vancouver Island which has been vested in the H.B.C. in 1867 for the first time. It is submitted that Manitoba received the same fundamental rights as in 1870 as a part of the British

IV

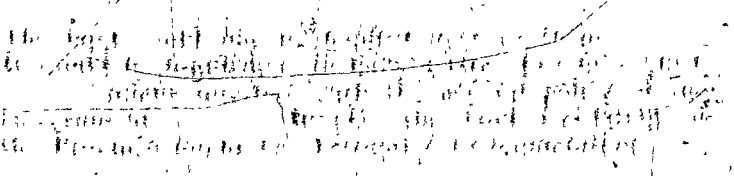
THE TRANSFER AND PROVINCIAL STATUS FOR MANITOBA

The Manitoba Act of the Canadian Parliament (subsequently confirmed by the B.N.A. Act of 1871) received the royal assent on May 12, 1870. It was to come into effect "on, from and after the day upon which the Queen shall, by Order in Council in that behalf, admit Rupert's Land and the North Western Territory into the Union or Dominion of Canada" so that Manitoba has never occupied any other than provincial status in the Canadian Confederation. The order in Council of June 23, 1870 which transferred Rupert's Land from the Crown to Canada on July 15 of that year thus made Manitoba a Canadian province, and the British principles already outlined apply here with peculiar directness and cogency to the whole Canadian period of that history since 1870.

Neither the Colonial Office nor the Canadian Government had contemplated the immediate establishment of provincial government in Rupert's Land. Canada provided a liberal constitution as soon as the needs and capabilities of the territory should be ascertained. To this the inhabitants of that large area and at first its lieutenant-governor, and its provisional councillors appointed by the Canadian government, objected. The only persons who took active part formally consulted in the matter. At the Convention of both English-speaking and French half of that party to meet Donald Smith, after-wards Lord Strathcona, Canadian Commissioner, that Dominion of the Canadian Government should appoint its executive and a Provincial Council should be elected and that it had not the power to alter [illegible] Whole the matter [illegible]

[illegible]

[illegible]



Unfortunately the special privileges embodied for the French in the *Manitoba Act*, and particularly the offer of a direct grant of 1,400,000 acres of land 'for the benefit of the families of the half breed residents' (33 Vic., c. 3, s. 31) were enhancements which greatly removed the opposition of the French Métis to the federal control of provincial lands. So precautions were taken to safeguard in the statute even the right as distinct from the immediate claim to the ultimate control of the land and the full beneficial interest therein as from the inception of 'responsible government' and provincial status in a British dominion.

The incidents outlined above are strongly confirmed by the fact that whatever constitutional authority may have attained the Federal Government in exercising under the circumstances temporary 'control' over the public domain in 1869, the provisions in Section 30 of the *Manitoba Act* are known to have contravened the wishes of the inhabitants — ~~indicated in every available record of those thoughts at that time~~. This is true not merely of the lists of rights given up ~~at various times under that influence~~. It is emphatically true of the great majority of English speaking as well as French inhabitants of the settlement, and this will be seen to be the case by the careful examination of the evidence upon this point.

During the period from December 1869 to April, 1870 there are no records to show that any of these lists of rights

[illegible]

(a) That at December 1 1869, drawn up by Riel and his followers and showing the local assistance of all upon local control over the public domain. Clauses 6 and 7 of this list are as follows

> "6 That a portion of the Public Lands be appropriated for the benefit of schools, the building of Bridges Roads and Public Buildings.
>
> "7 That it be guaranteed to connect Winnipeg by Rail with the nearest line of Railway within a term of five years, the Land Grant to be subject to this Local Legislature."

(b) At the first representative Convention called to meet Commissioner Smith at Fort Garry in February, 1870 a committee was appointed to draft a "list of rights" as a basis of discussion. Two lists were drawn up one on the basis of provincial rights (drawn up under Riel's influence but thrown out as already settled by the Convention without being read or discussed) and the other on the basis of territorial status. The first was the usual claims for land and to such was Commissioner Smith replied for the Canadian Government. Clause 12 reads as follows

> "12 That the Local Legislature of the Territory have control of all the public land except a reservation now having Upon Fort Garry & the roads lead that the value of this reservation for the purpose of building the American line of Railway from Fort Garry."

Commissioner Smith replied in part that still and only central matter will be done in the matter of This point must be regarded as the only one to which the inhabitants of the Red River settlement [illegible] have given approval and it is to be noticed that the demand for the control of the public lands was under territorial status as made in the most explicit terms.

(1) The list drawn up on the basis of provincial status was supplied nevertheless by Thomas Bunn as Secretary of State of Riel's 'Provisional Government' to the three local delegates who eventually proceeded to Ottawa, and it was printed in French at the Settlement on the eve of their departure.[1] This list was erroneously considered to have furnished the basis of the conference on the *Manitoba Bill* at Ottawa and it was printed accordingly in the British blue book *Recent Disturbances in the Red River Settlement*, 1870. In this list clause 11 reads as follows:

> 11. That the Local Legislature of the Province of Assiniboia shall have full control over all the public lands of the Province and the right to annul all acts or arrangements made or entered into with reference to the public lands of Rupert's Land and the North West, now called the Province of Assiniboia.

(2) The secret list of rights upon which Father Ritchot based the discussion of the *Manitoba Bill* at Ottawa, and containing in substance for the first time for instance the famous school clause eventually embodied in section 22 of the *Manitoba Act*, was drawn up secretly as already stated at Bishop's Palace in St. Boniface and was first published eighteen years afterwards by Archbishop Taché during the school controversy. In this list clause 11 reads as follows:

> 11. That the Local Legislature of this Province shall have full control over all the lands of the Northwest.[2]

It is seen, therefore, that in respect of public lands the *Manitoba Act* contravened every formal expression of opinion, both English-speaking and French, in every list of rights drawn up at the Red River Settlement during the period of transfer. There were undoubtedly many weighty reasons of national policy for retaining federal control of the public domain in 1870, such for instance as a uniform policy of immigration, the requirements of transcontinental com-

[1] *Recent Disturbances in the Red River Settlement* [illegible]

[2] Archbishop Taché [illegible]

[illegible] in order to bring British Columbia into Confederation [illegible]. Whatever may be thought of the provision that the land should be 'vested in the Crown and administered by the Government of Canada,' however, the [illegible] for the purposes of the Dominion may never [illegible] in any other light than an [illegible] and deliberate violation of the [illegible] which Canada had [illegible] to undertake with regard to [illegible] as part of the British Colonial System, and in [illegible] with the equitable principles which have [illegible] the British Crown. The [illegible] of the [illegible] interest as well as the control over the public domain of the West [illegible] in the Alberta and Saskatchewan Acts [illegible] and even in the Manitoba Boundaries Extension Act of 1912. This province, therefore, has the [illegible] distinction among the provinces of Canada and the self-governing Dominions of the Empire, not only of having been [illegible] in respect of public lands by provisions in the [illegible] but [illegible] of the [illegible] of the inhabitants of the country [illegible] by [illegible] in the [illegible].

[illegible]

1\. The Province [illegible] that upon transfer to Canada [illegible] in [illegible] should [illegible] to one of the Provinces of the Dominion of Canada. [illegible] of this province [illegible] there has been no [illegible] and British [illegible] with [illegible] in the [illegible] Canadian [illegible] history [illegible].

2\. The [illegible] of the [illegible] and the [illegible] which [illegible] and [illegible] in the [illegible] and [illegible] against this province.

3\. With [illegible] particularly [illegible] the [illegible] control of the public domain [illegible] in 1870 [illegible]

that of the province for fifty years. They wished to have all the lands [illegible] as the other Provinces. The land could not be handed over to them. [illegible] A large Province [illegible] might interfere with the [illegible] the Government. [illegible] The land legislation of the Province might be [illegible] to immigration. (Sir John A. Macdonald in debate on Manitoba Bill)

The Manitoba Act contained in a short list of clauses which remained practically unknown to the inhabitants of Manitoba for nineteen years. Both the British and Canadian authorities [illegible] the Manitoba Act as [illegible] which would [illegible] Manitoba. Manitoba [illegible] the [illegible] of Canada [illegible] particularly those relating to the public domain [illegible] imposed upon the inhabitants of this province [illegible] their consent [illegible] their knowledge.

[illegible]

[illegible]

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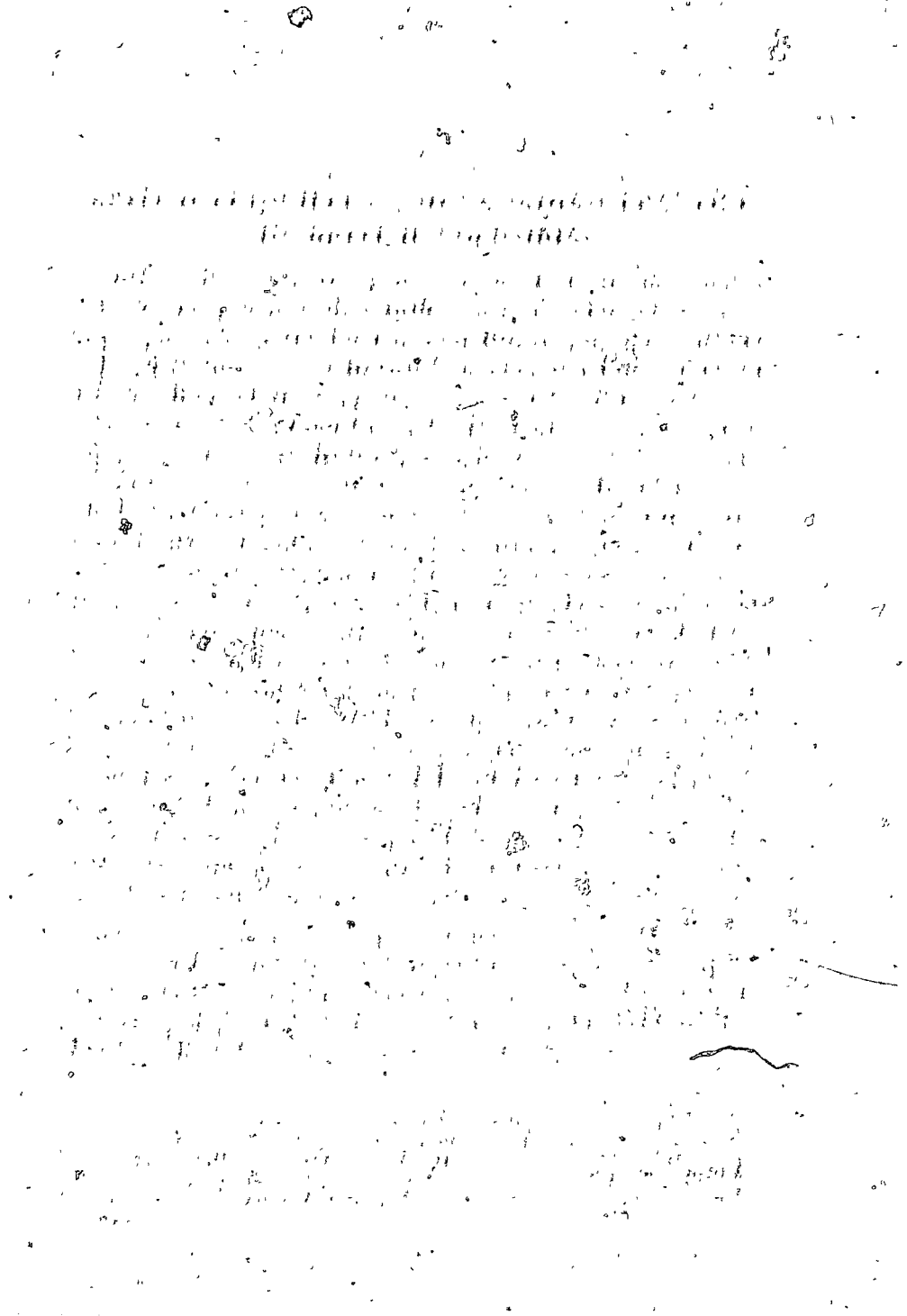
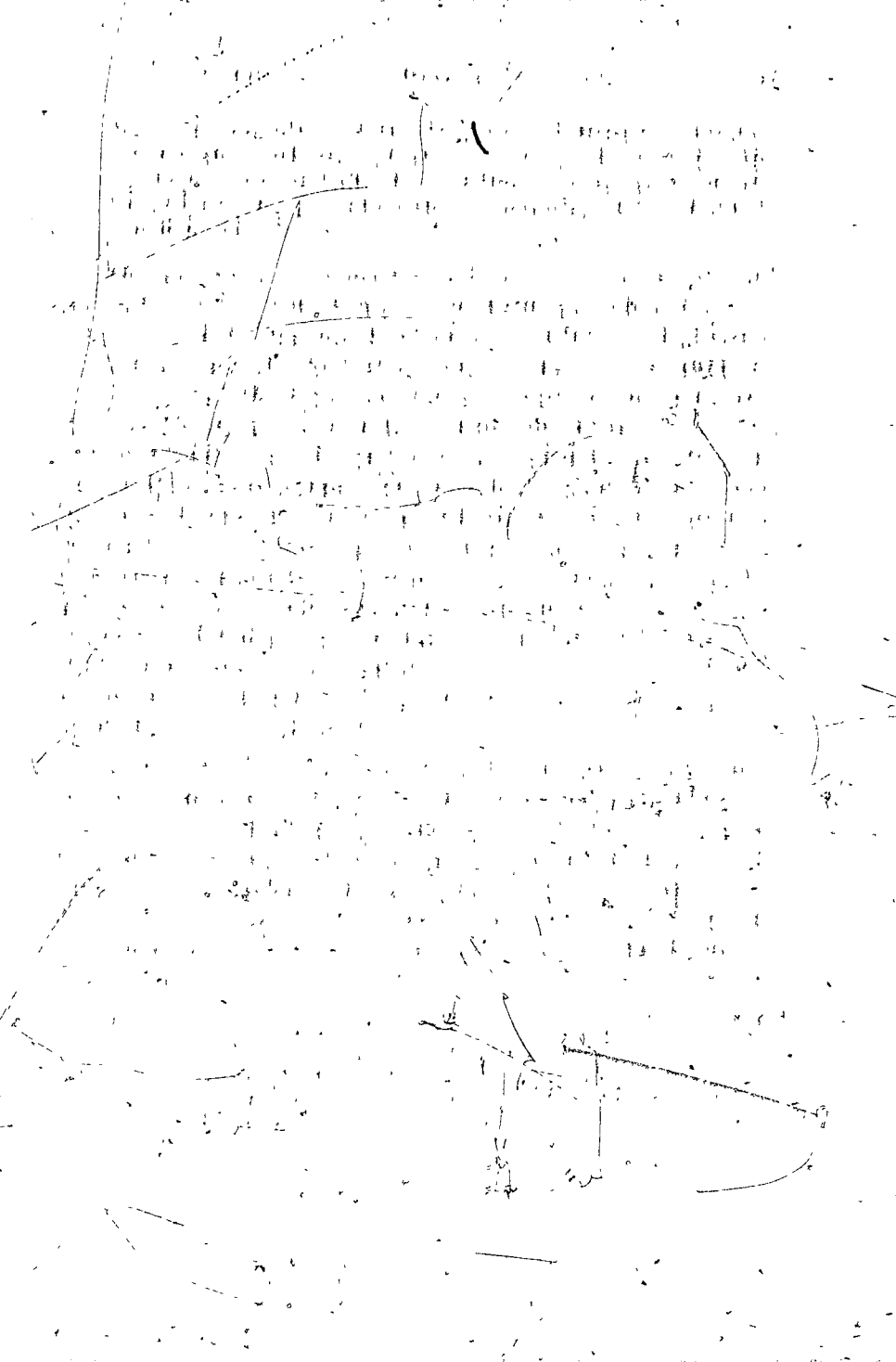
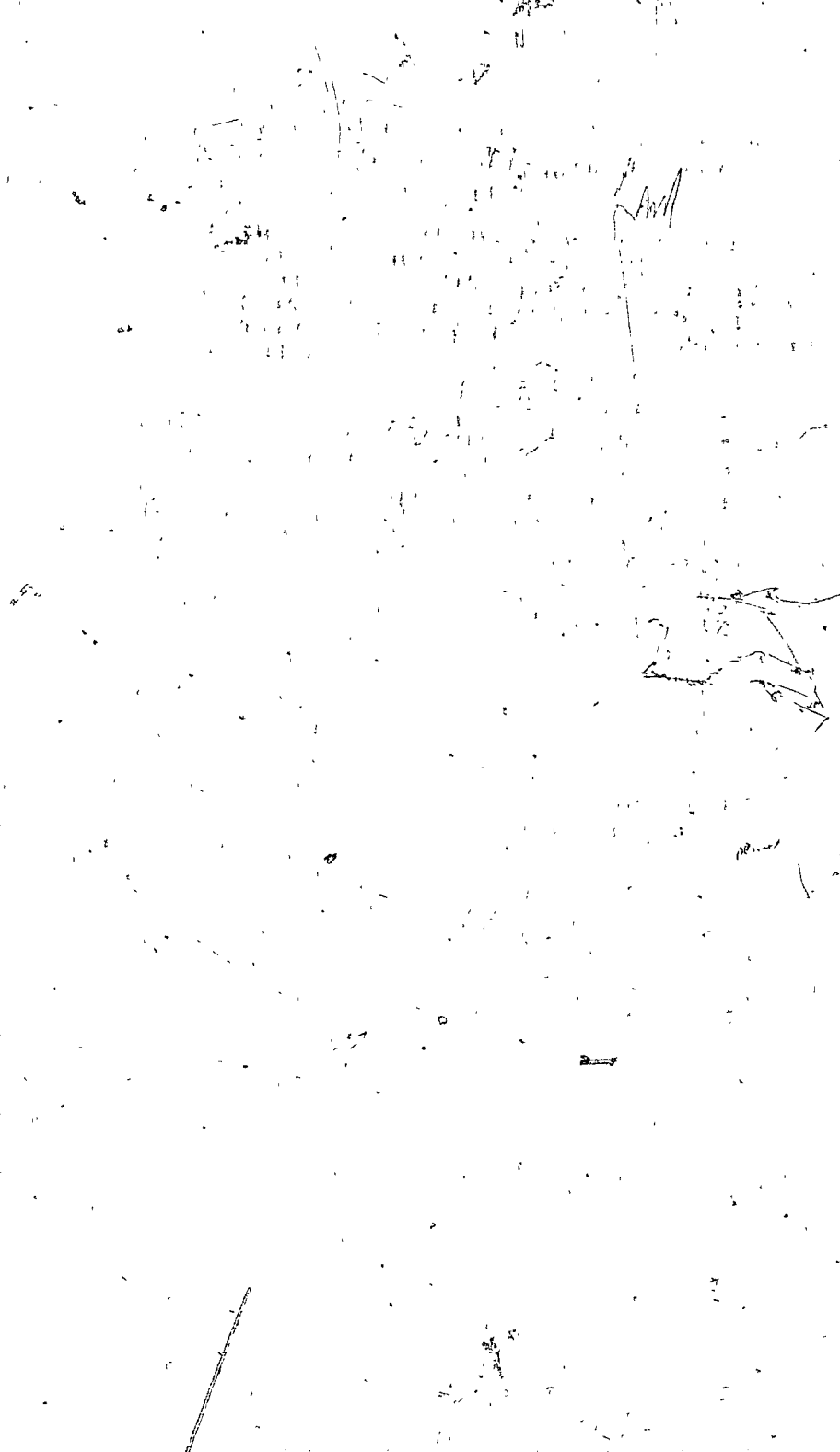
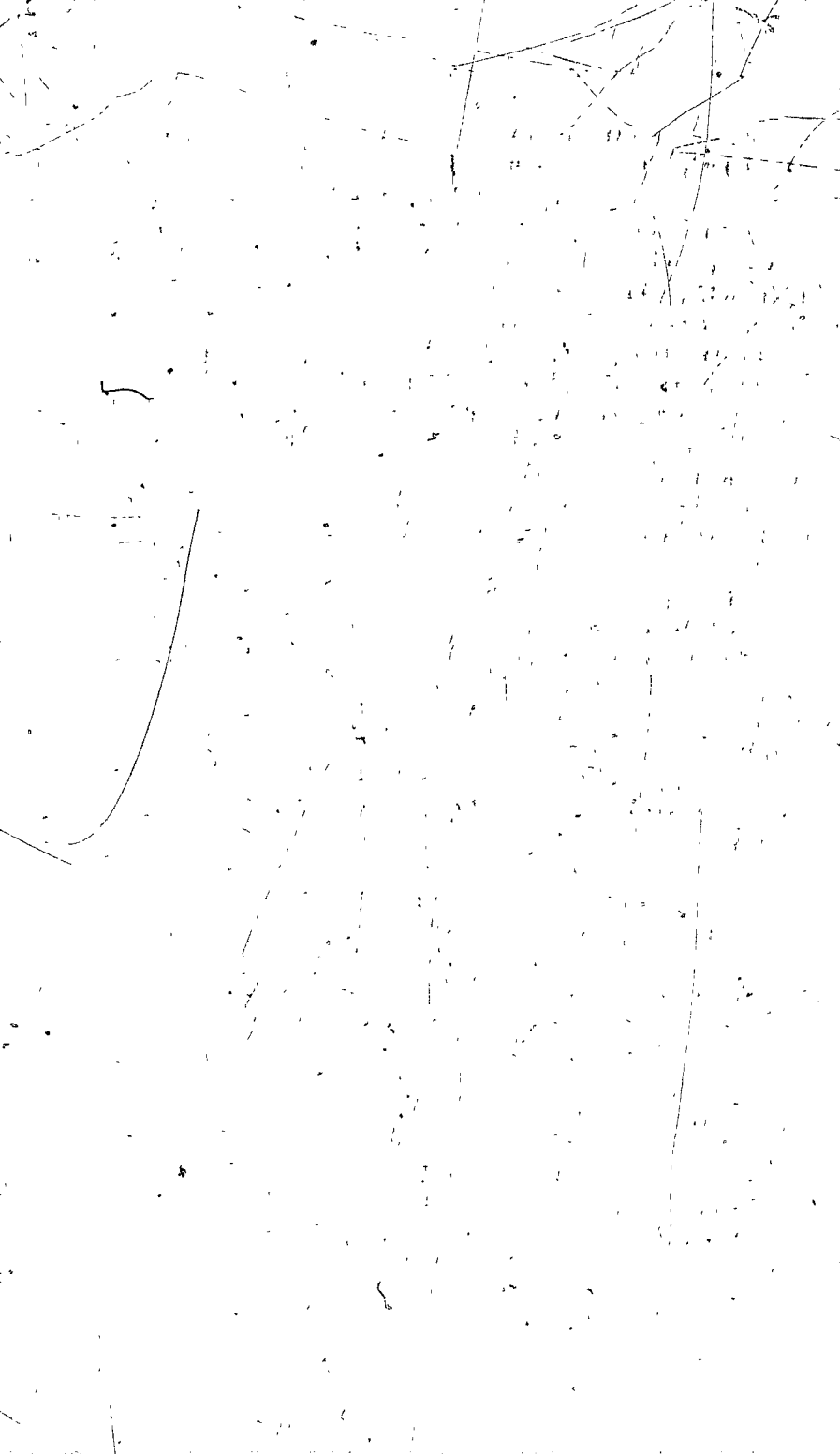
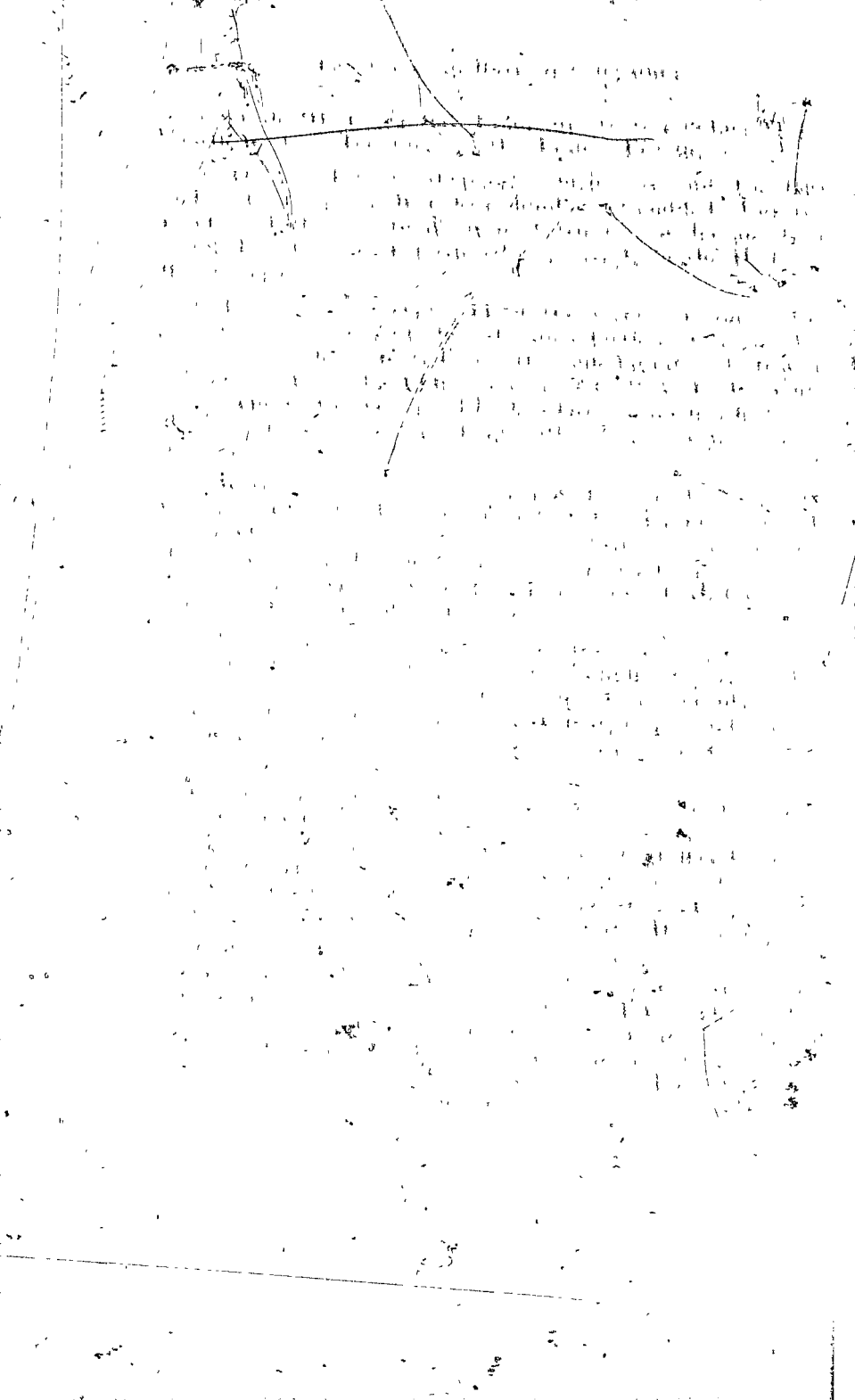
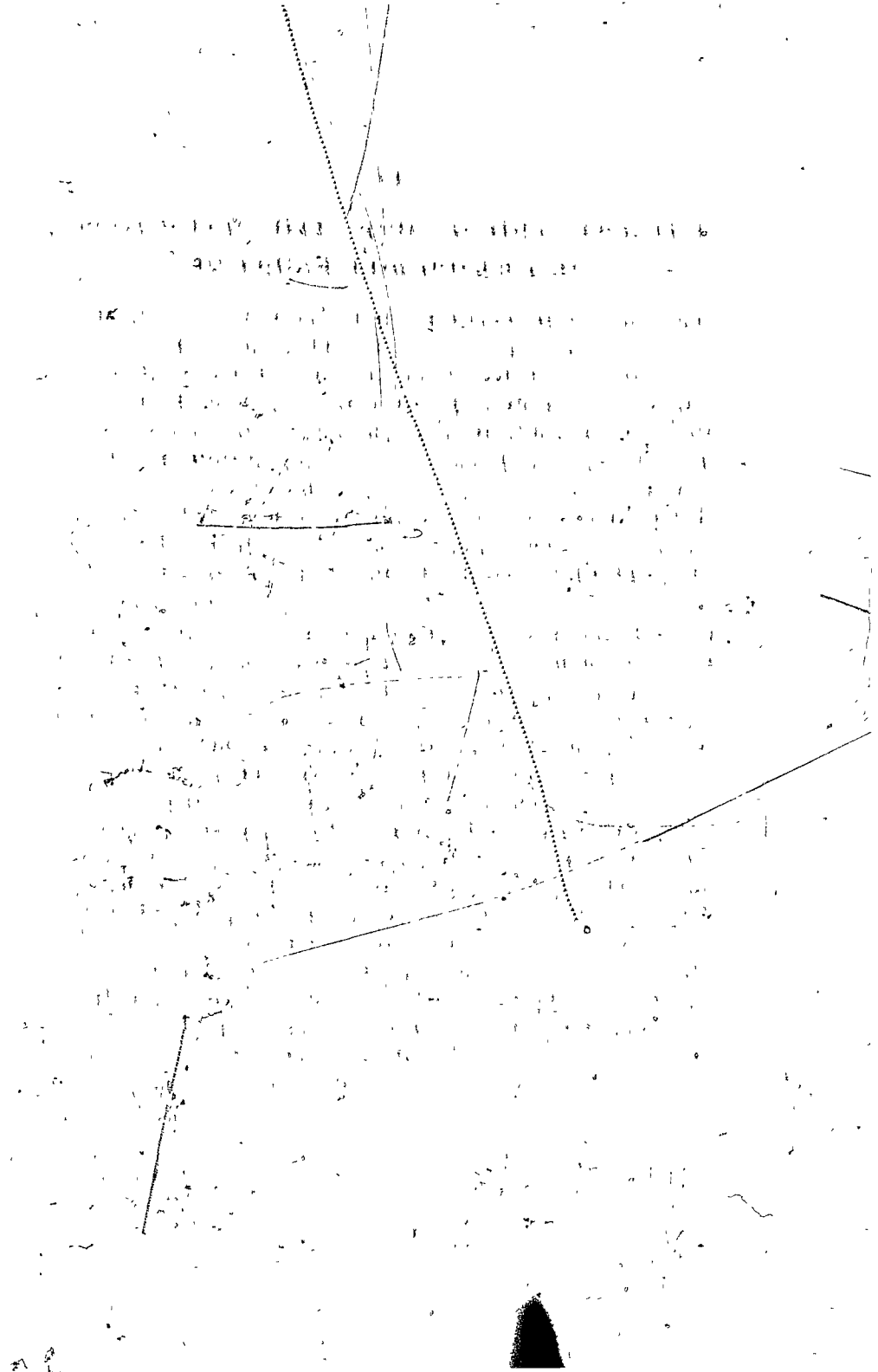


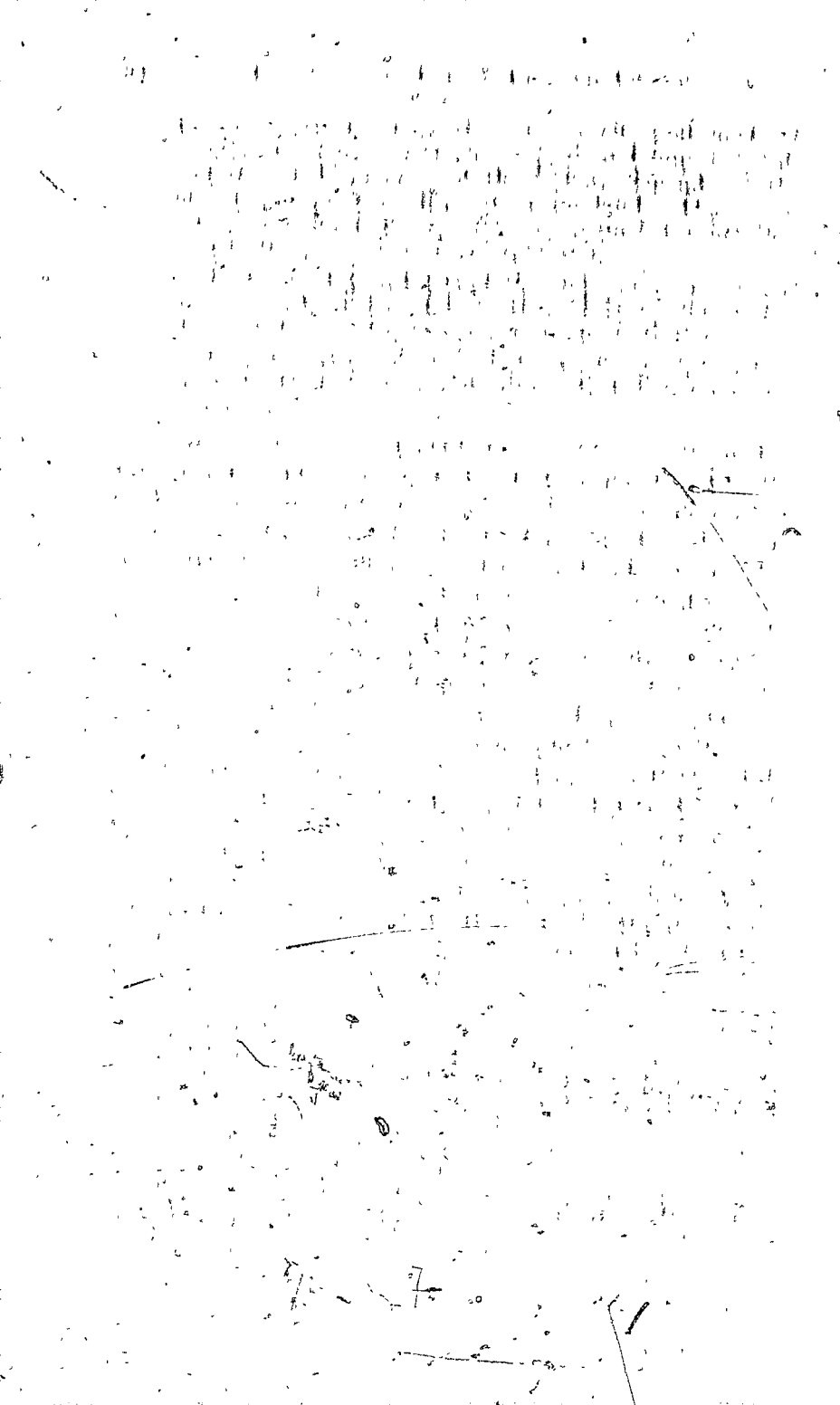


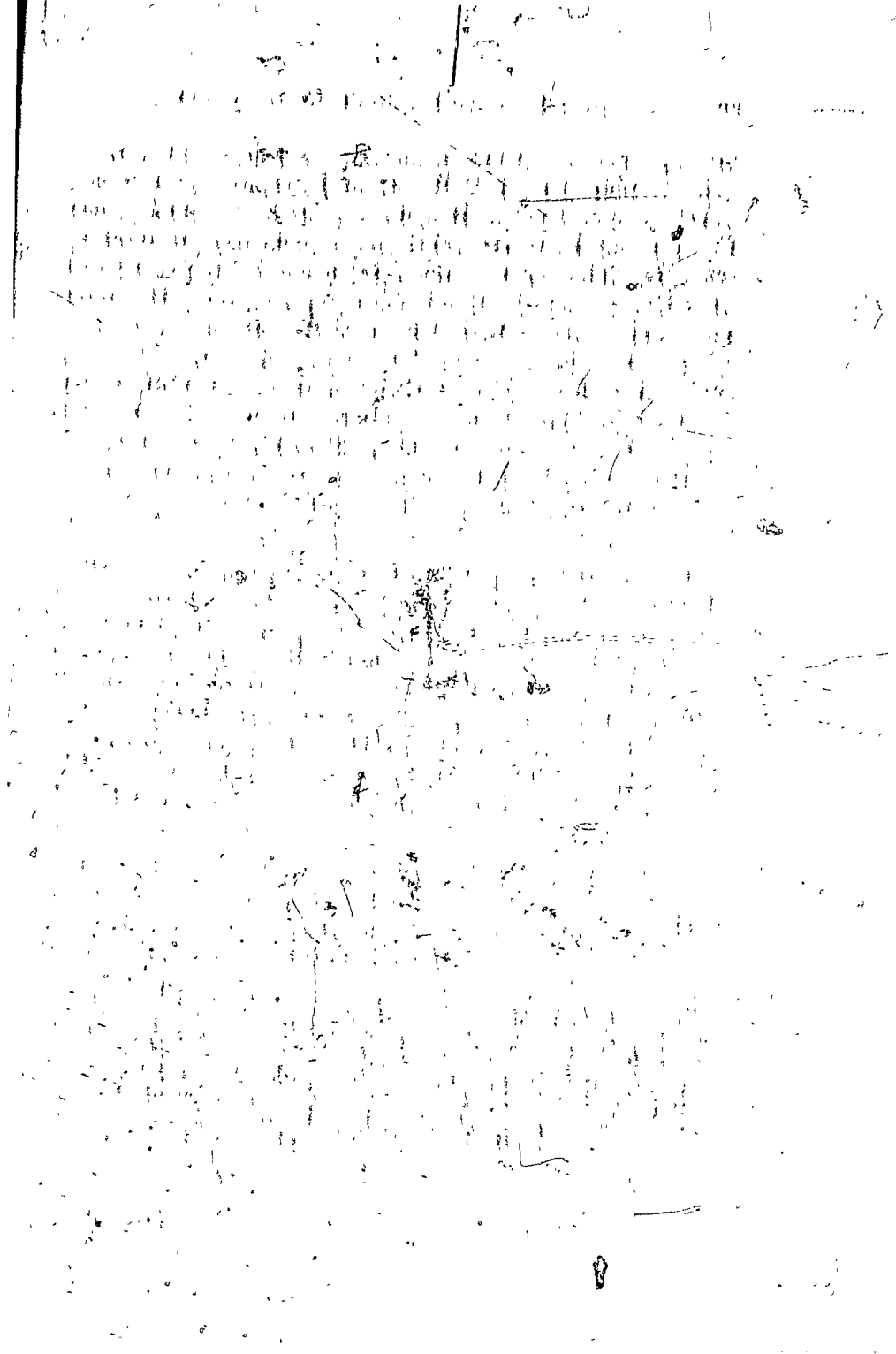


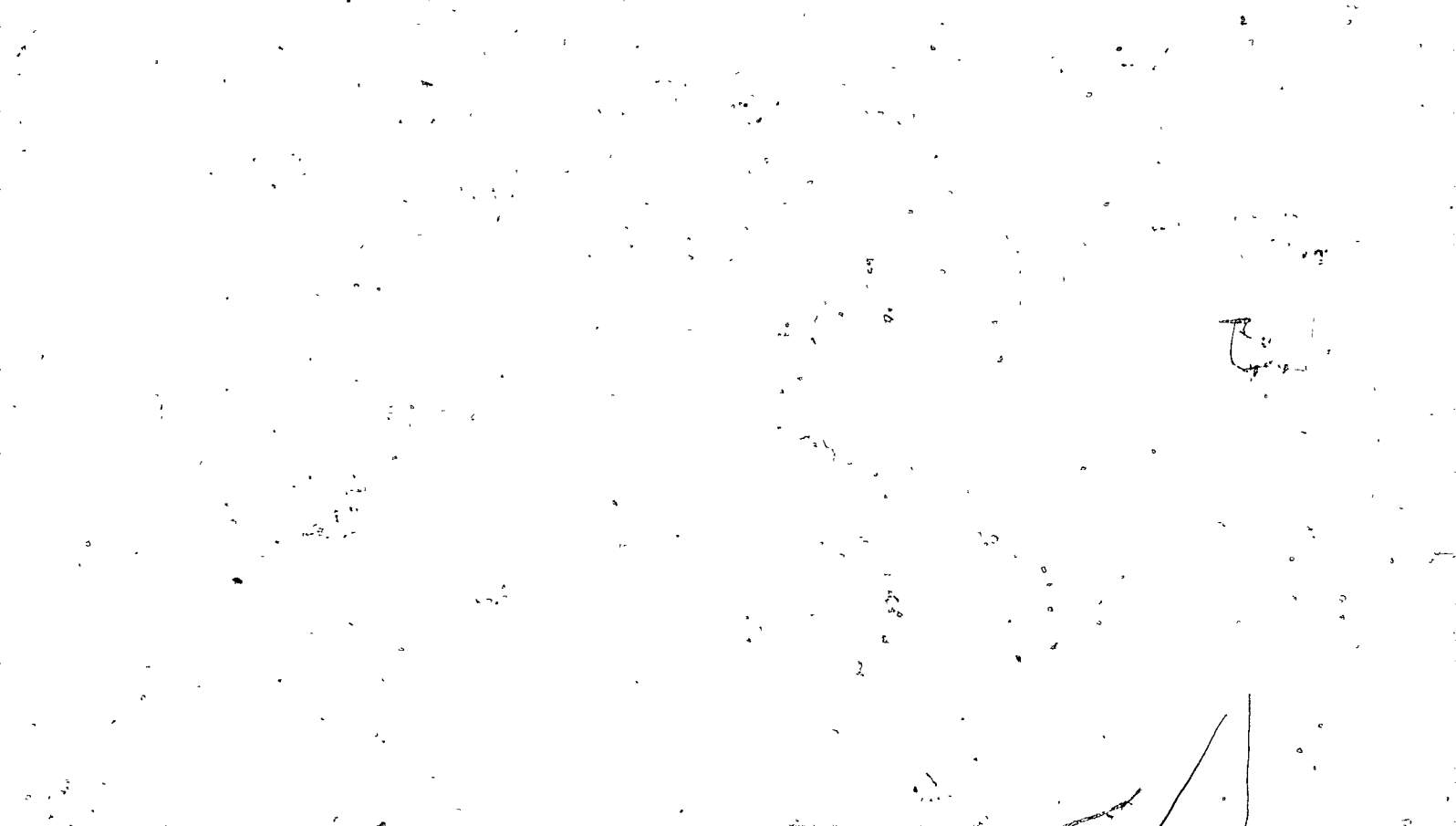


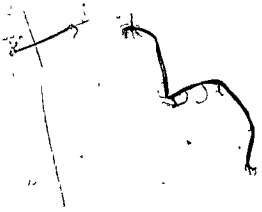


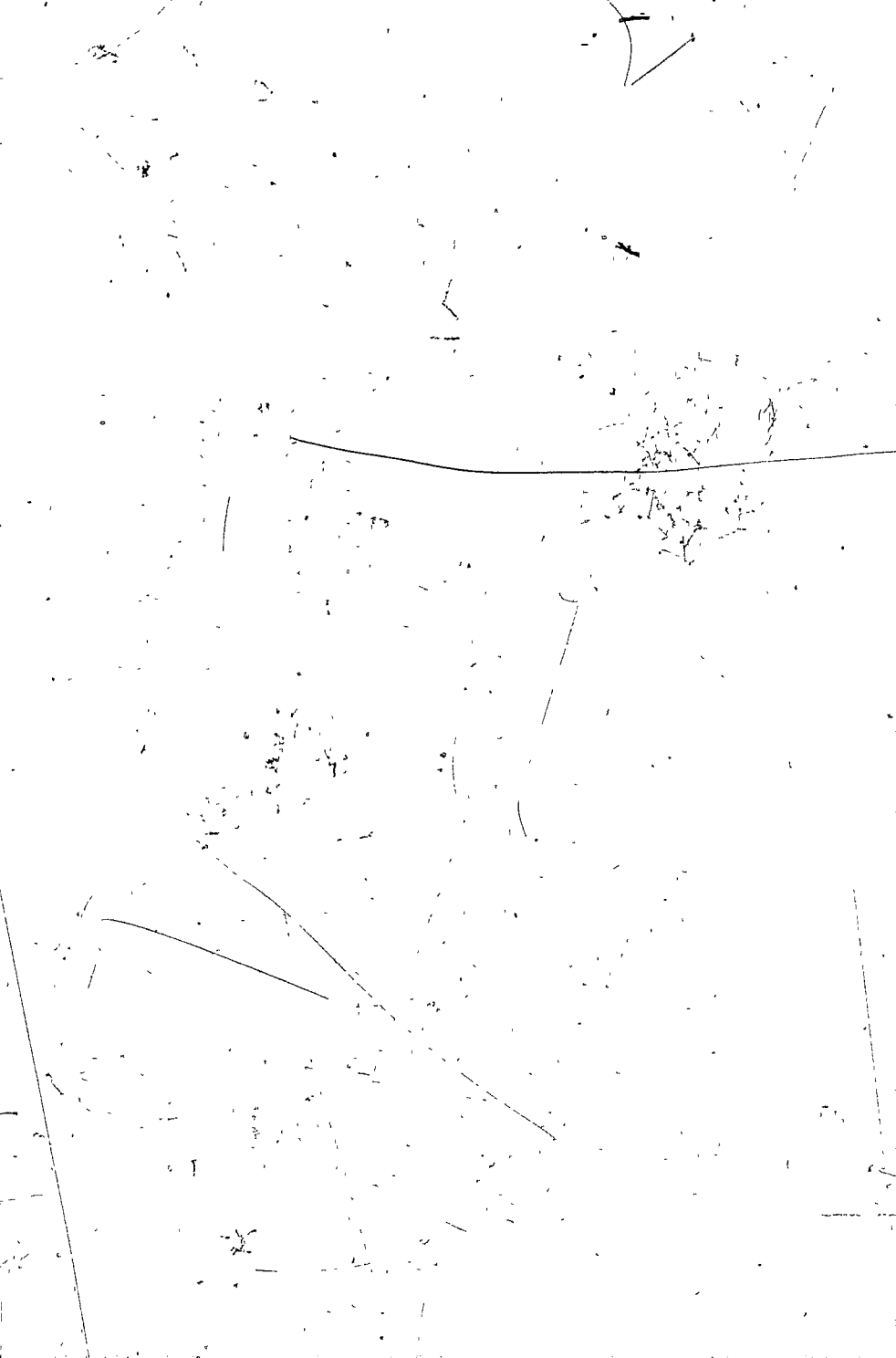


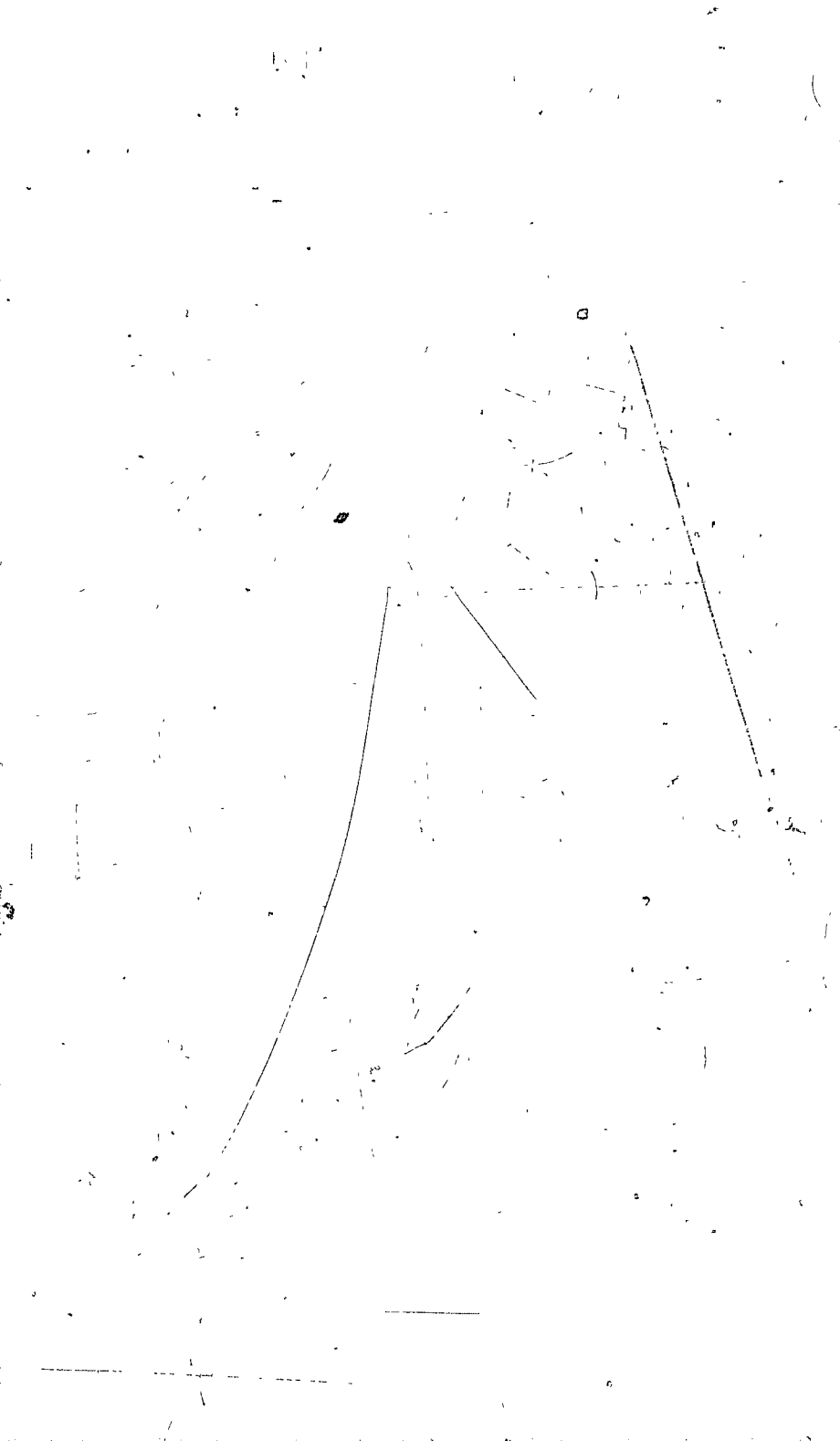


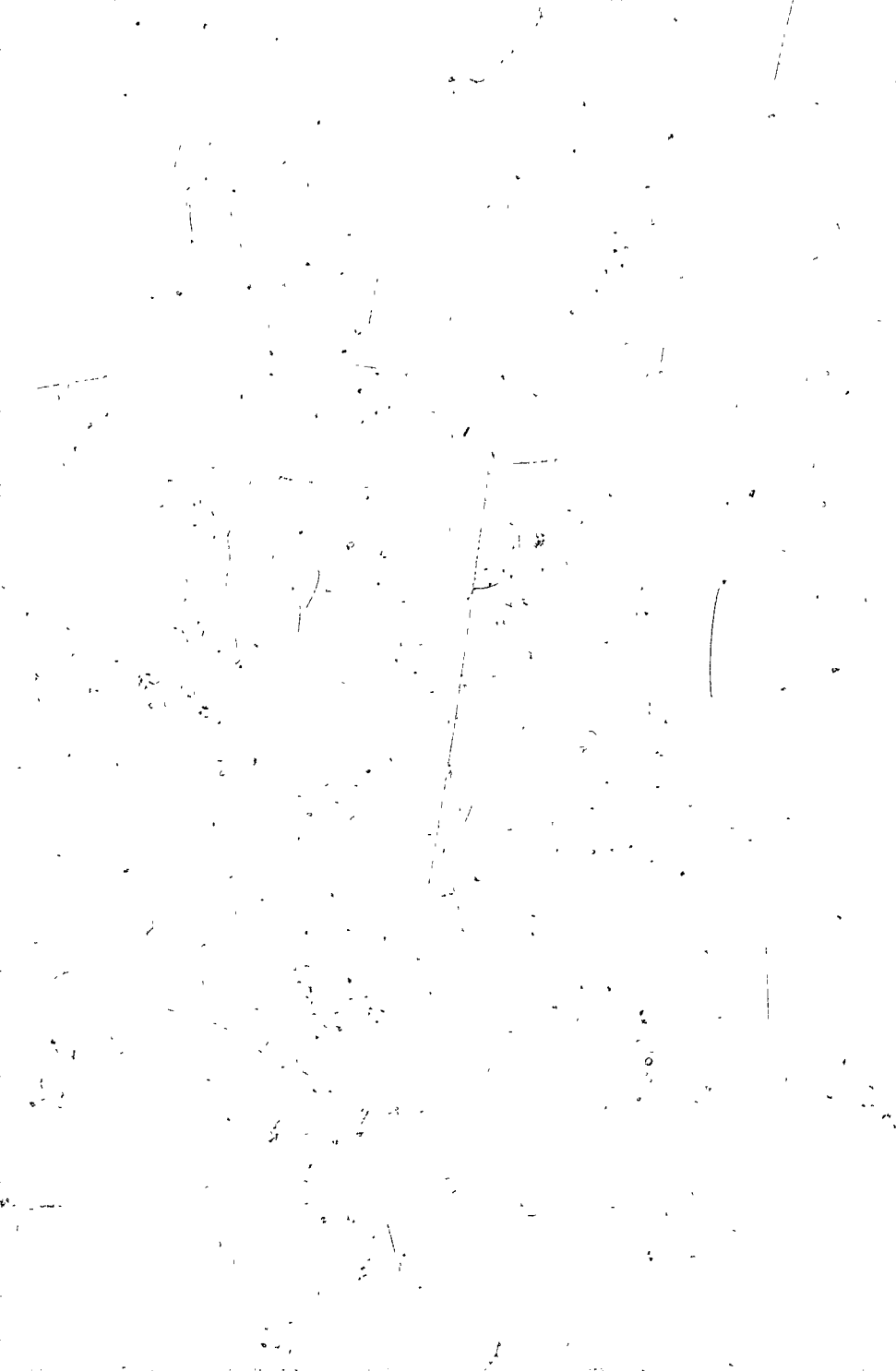


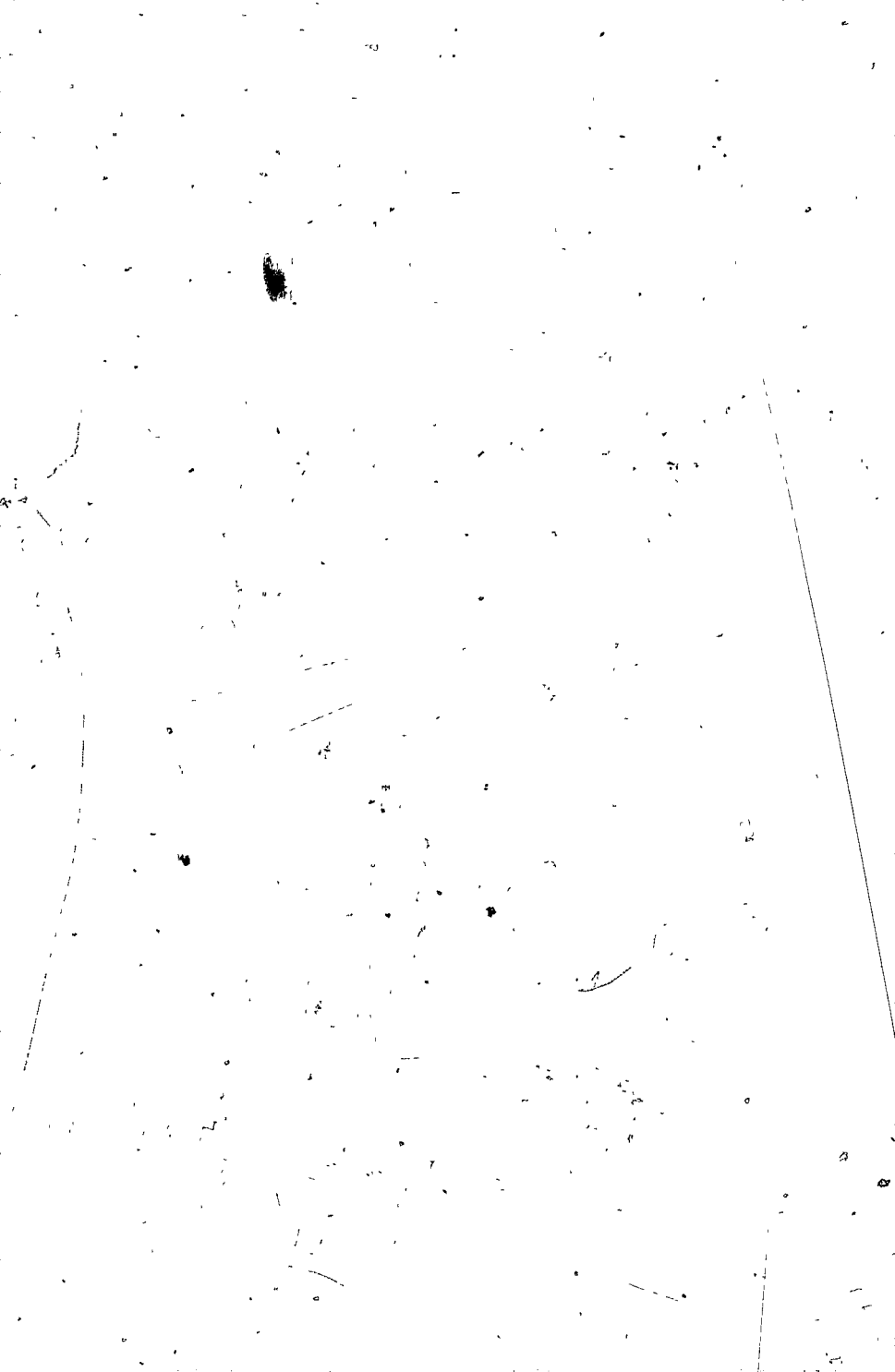


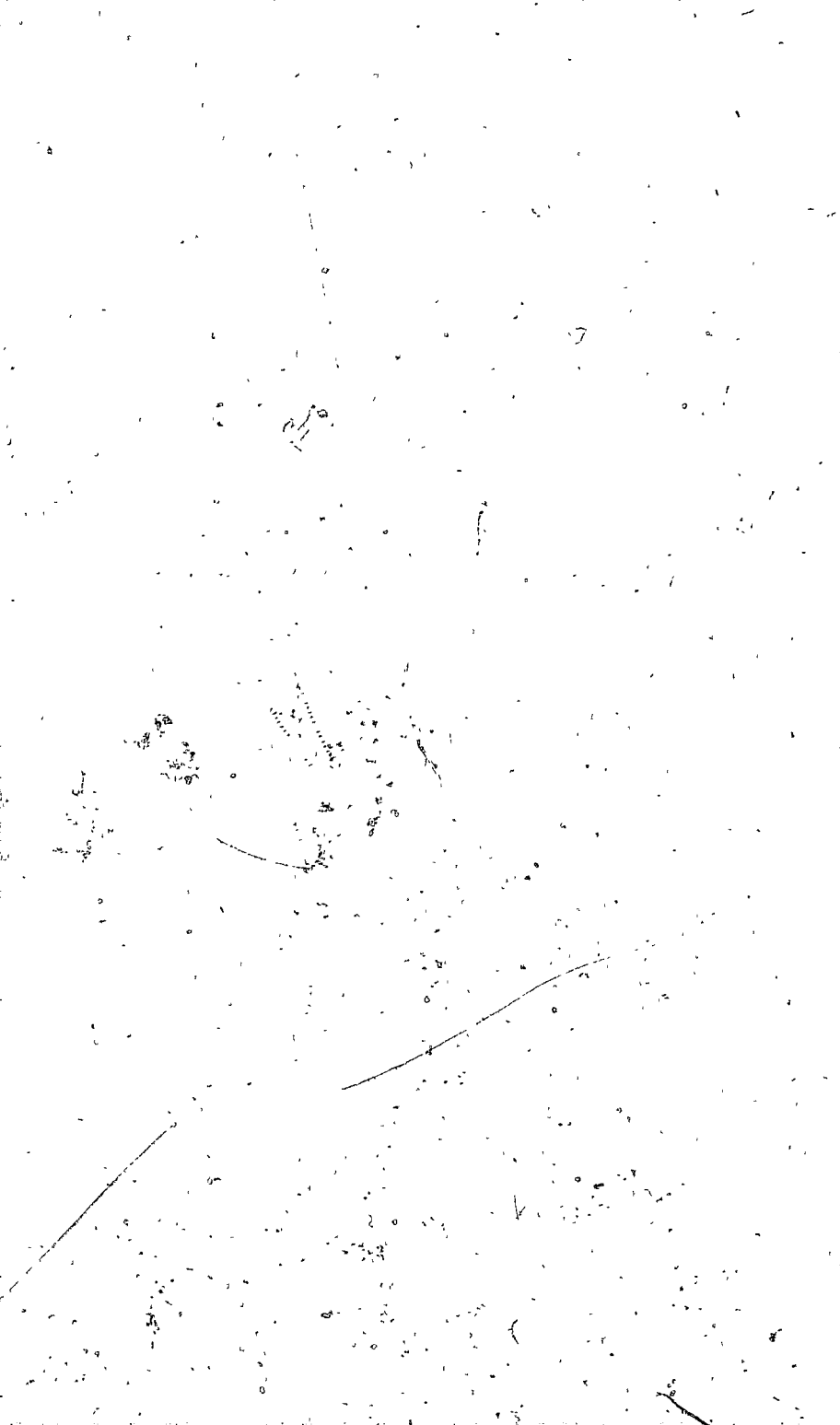


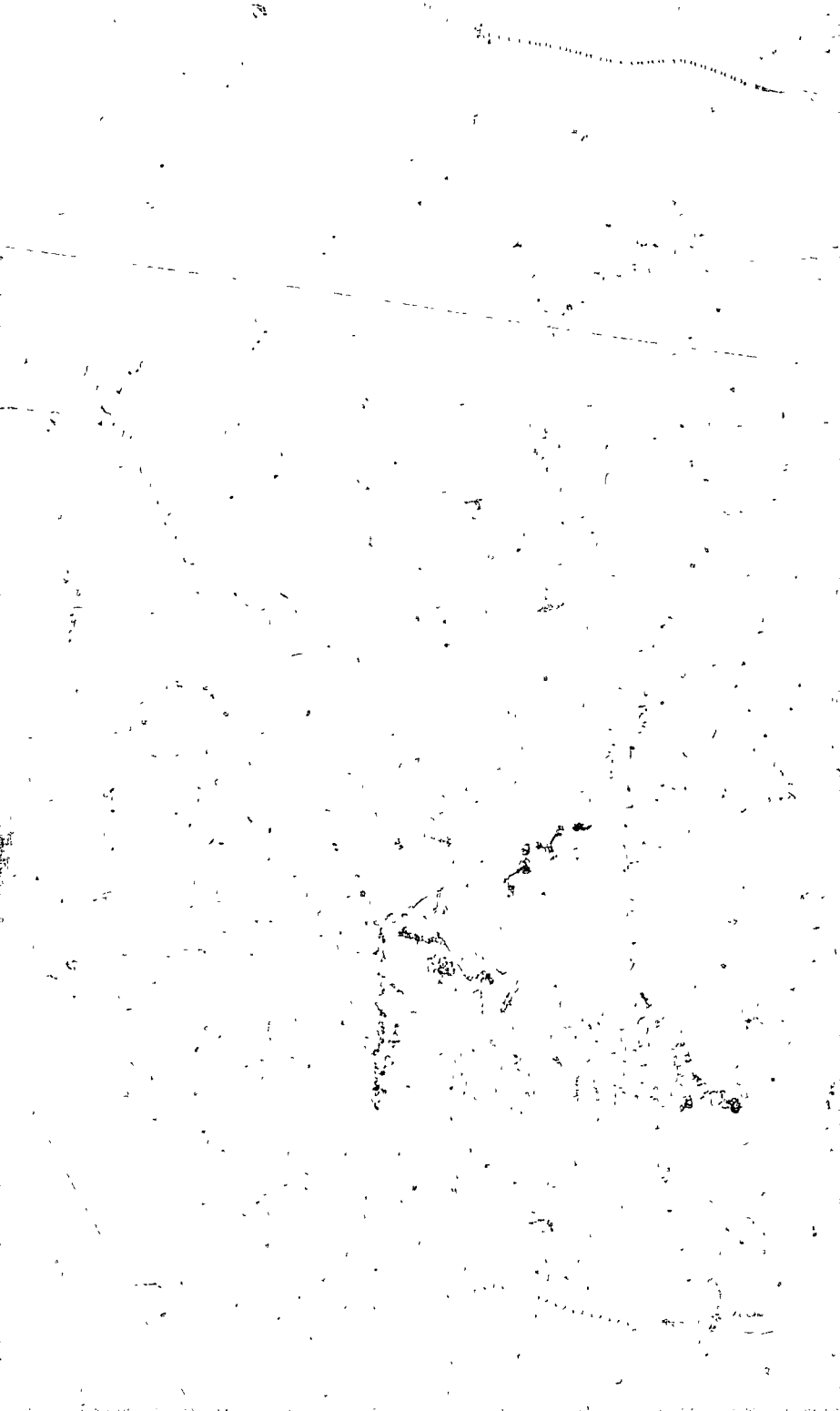


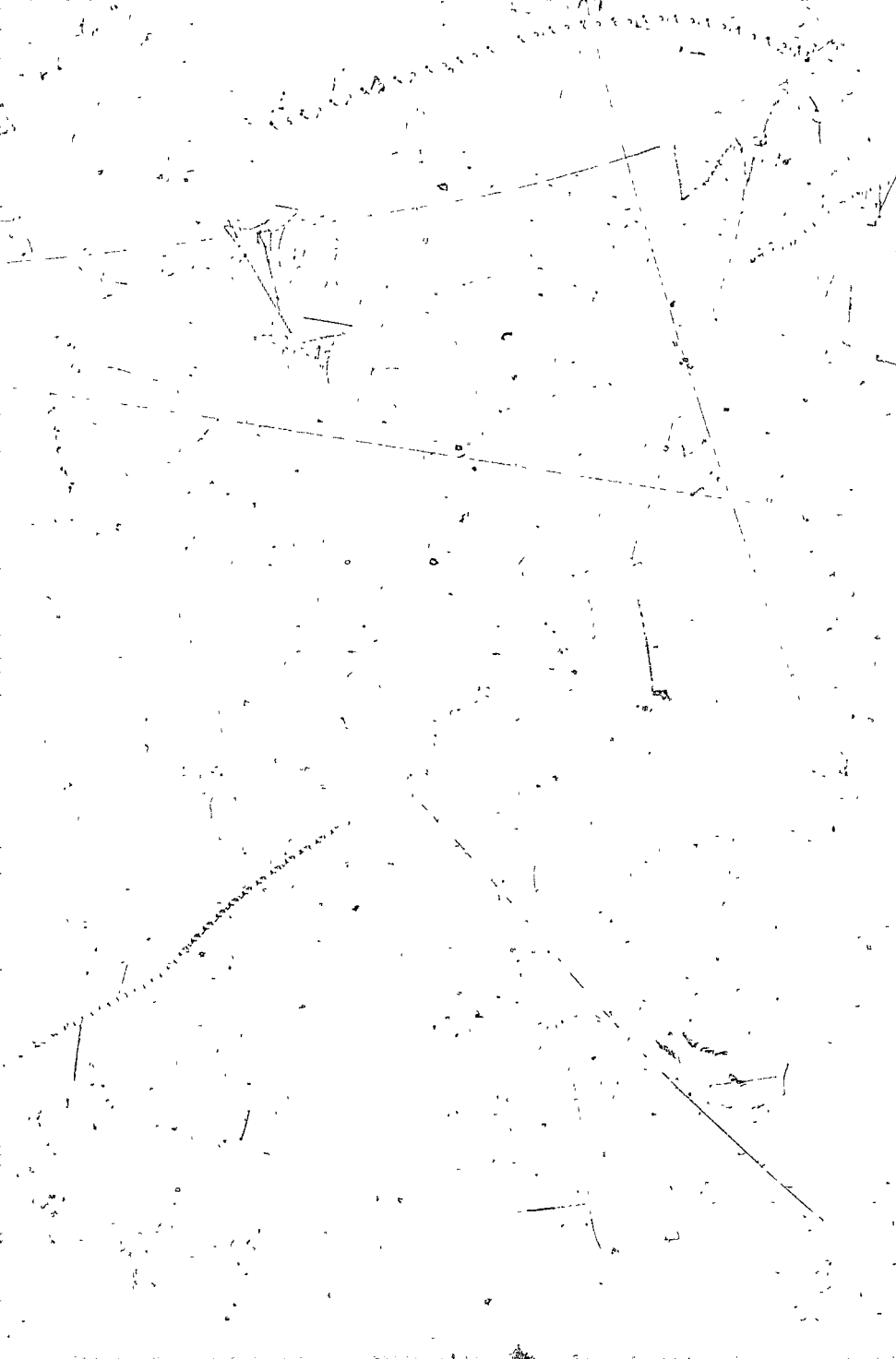


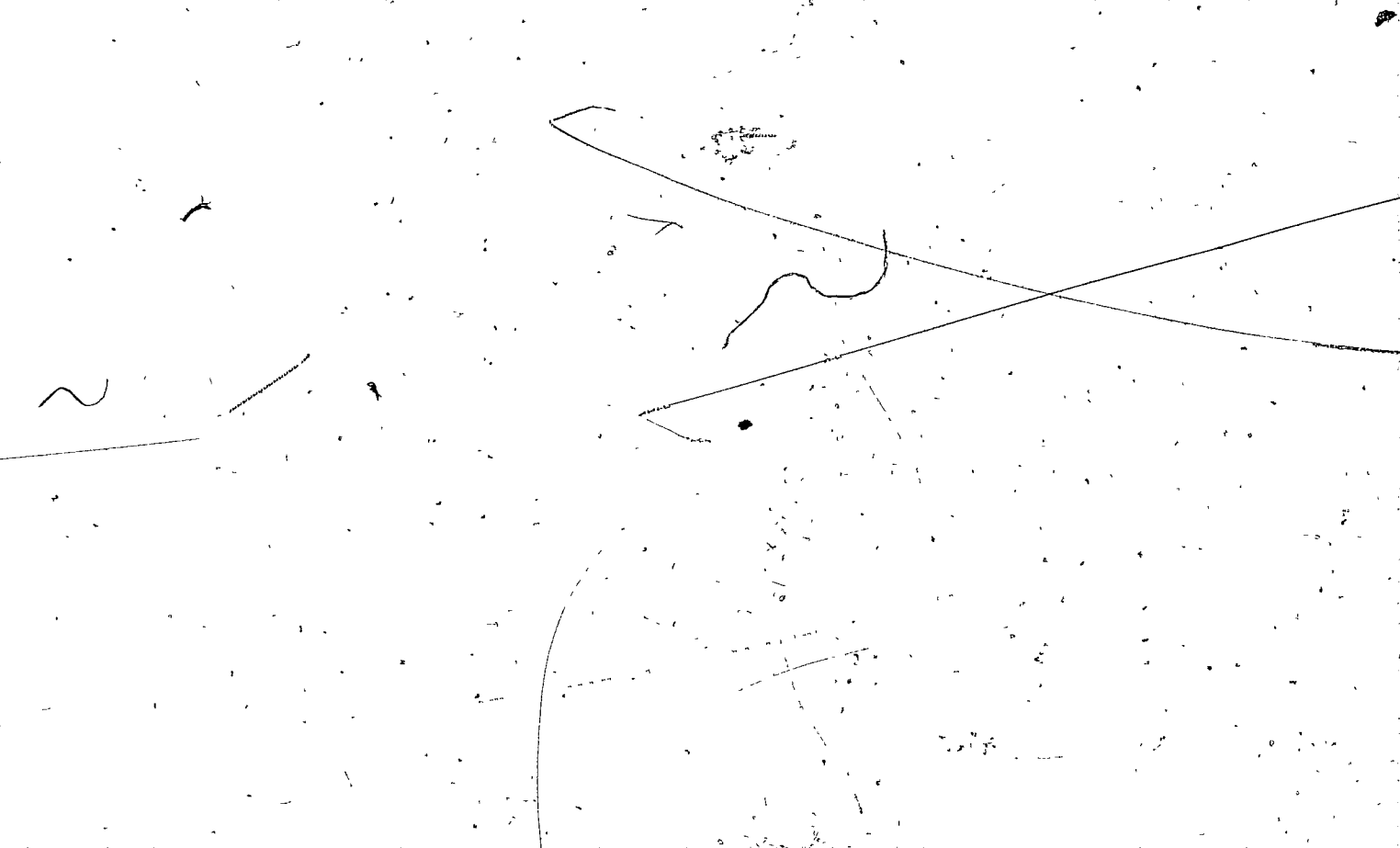


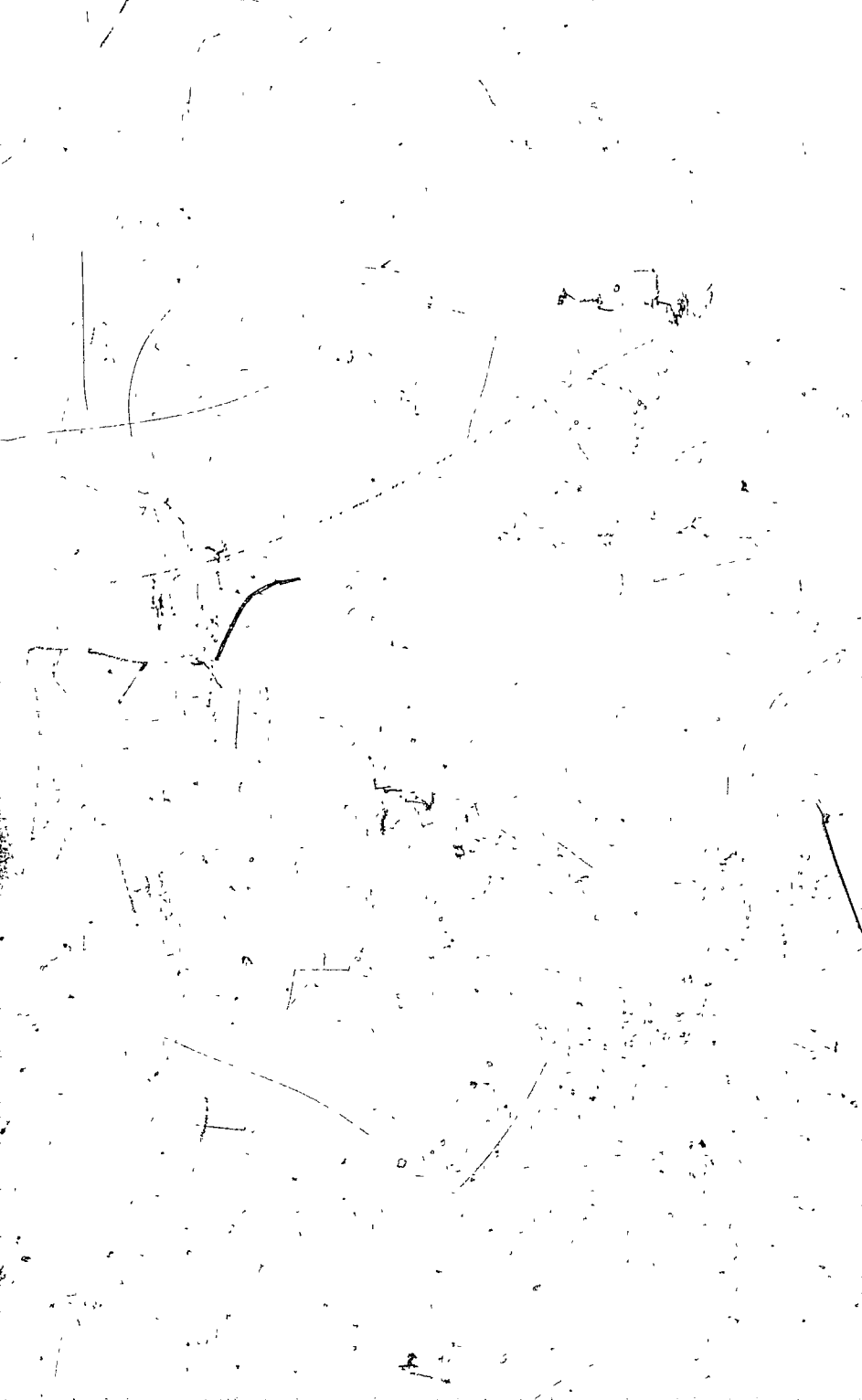


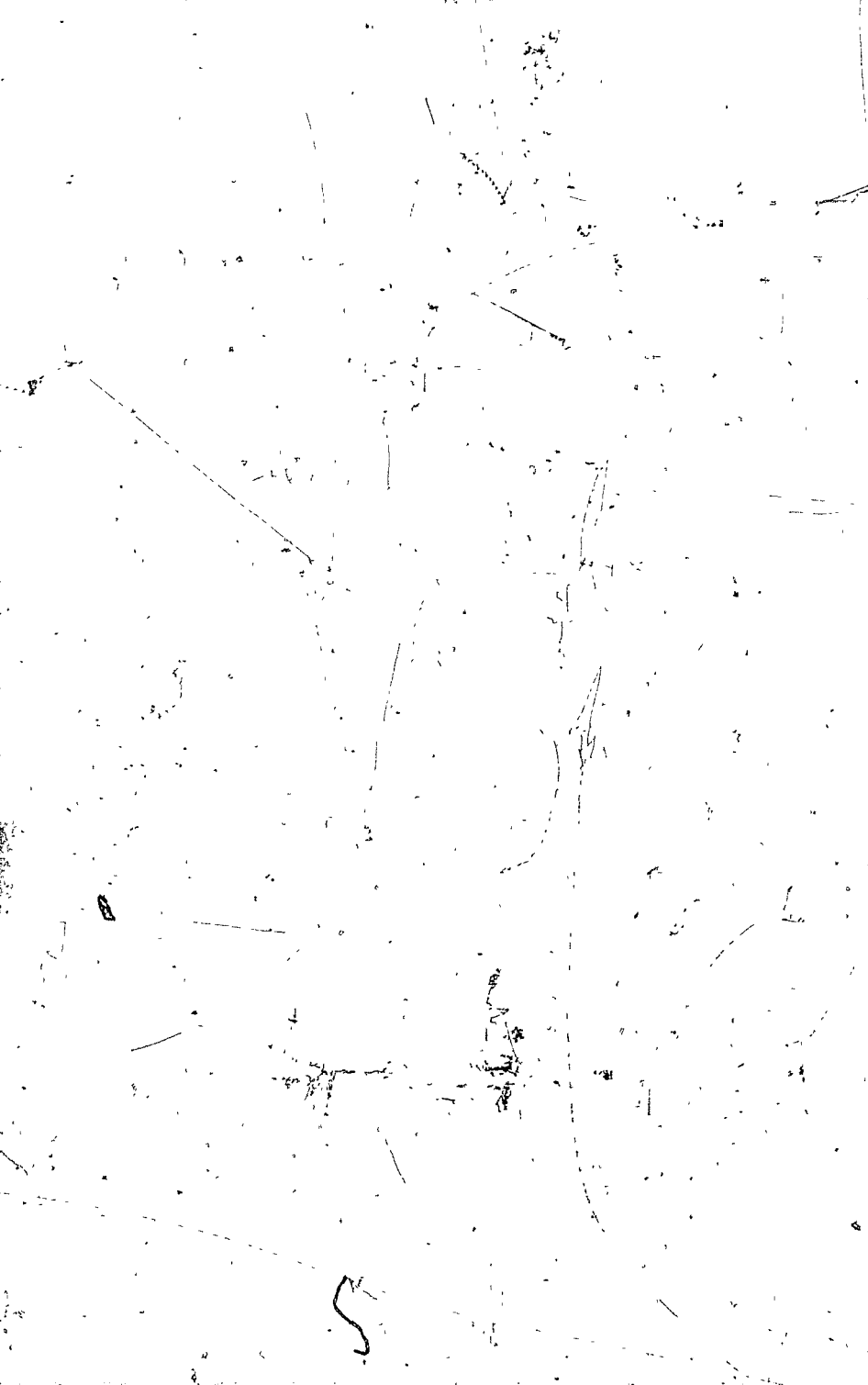


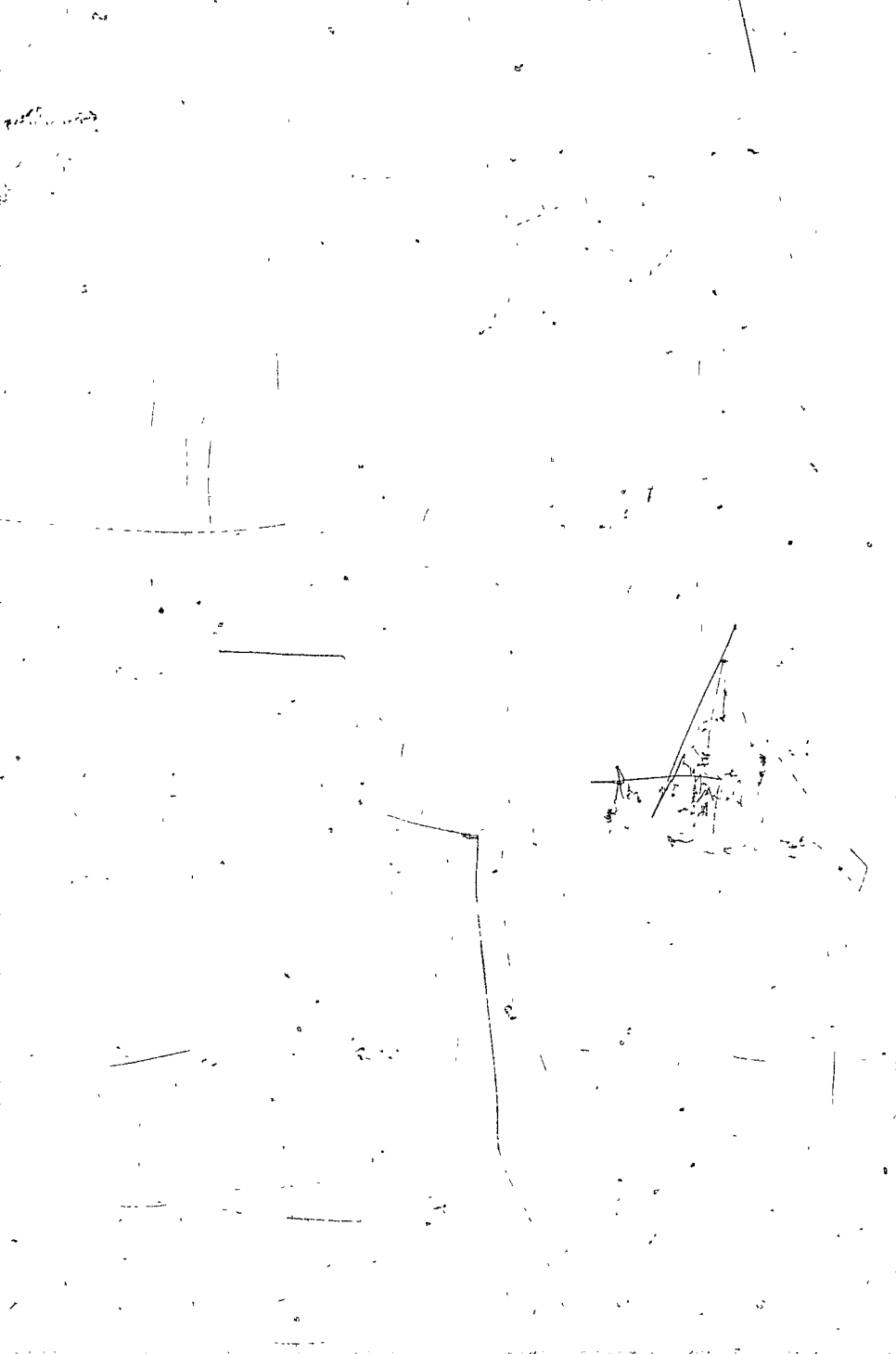


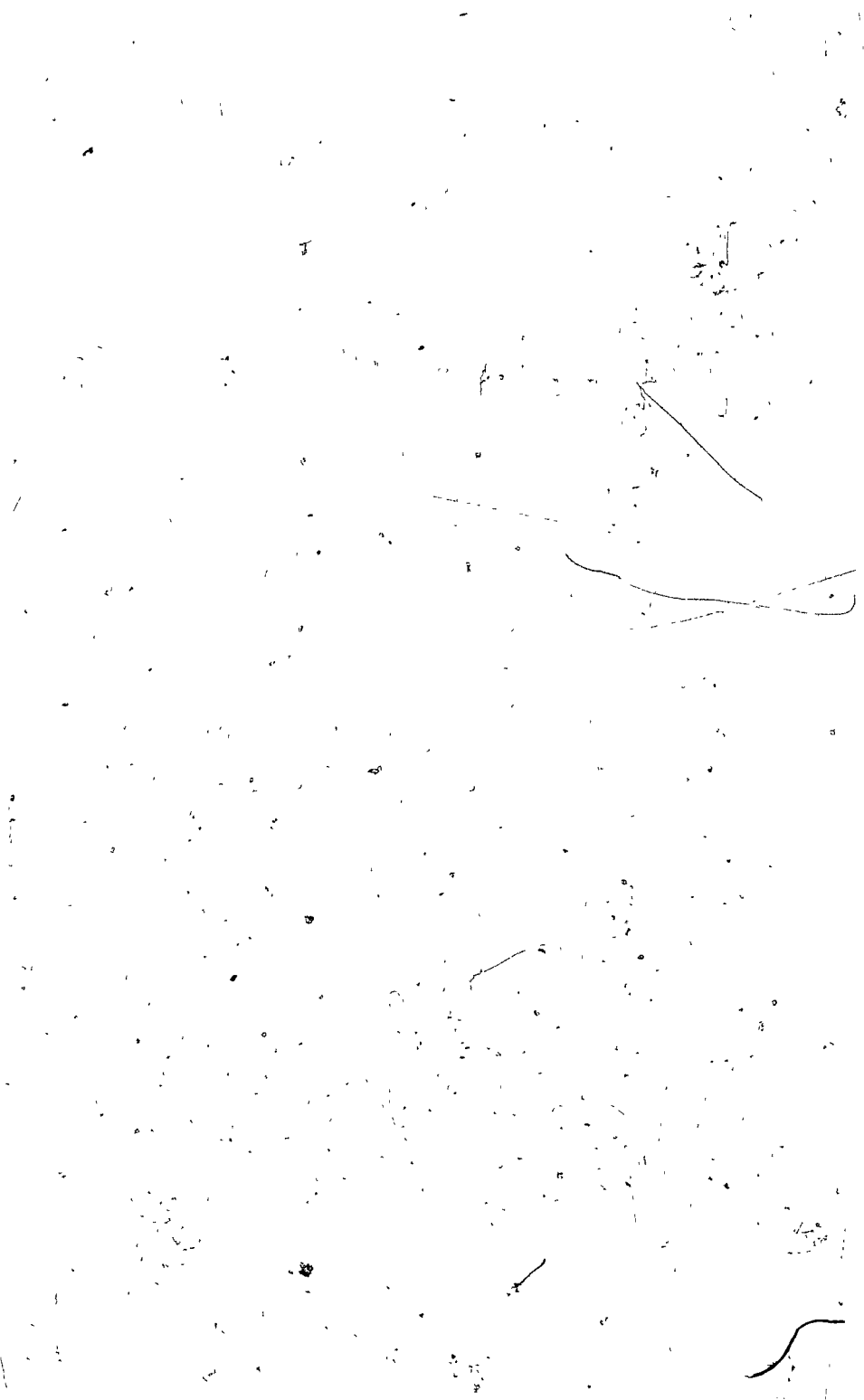


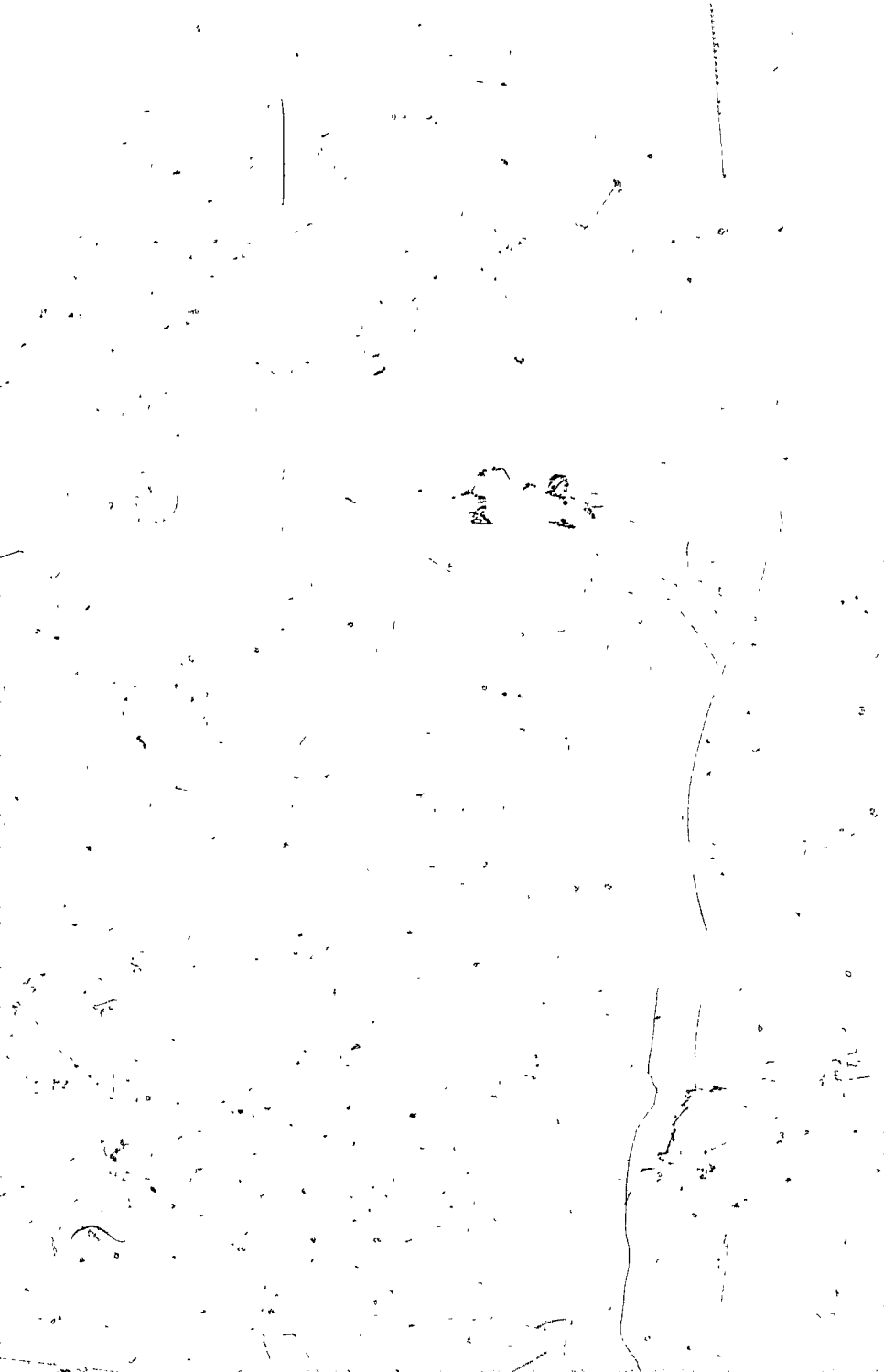












"The spirit of Confederation contemplated that in and as it should be, and there is [illegible] to be felt all over the Province among those who are doing their best to develop the resources of the country [illegible] the [illegible] of being entrusted to the main responsibility of Government and Legislation of Canada and Europe, as are the citizens of other Provinces, willing to the enjoyment of those sources of revenue allowed other members of Confederation for the promotion of their own development."

"That this state of affairs should continue is neither fair to the Province nor creditable to the Legislature, and the Federal Authorities are responsible for the discriminating legislation and restrictions imposed upon the Province, the undersigned feels it his duty to refer these facts [illegible] for consideration to the Privy Council, who, by a timely and favorable consideration of the subject, can avert calamitous misfortune to the Province."

The result of a delegation to Ottawa in May, 1884, was an agreement by the Federal Government that the swamp lands at least shall be transferred to the Provincial Government and [illegible] to the benefit [illegible] With the exception of the school lands in which the control was vested in the Dominion with the beneficial interest reserved to the province, the 'swamp lands' were thus the first subsidy and remained, until they reverted to the Dominion in 1913, the only subsidy of the public domain in Manitoba in which British precedent have ever obtained; and even here the precedent, it will be seen, was not British but American.

This utterly inadequate compensation, however, was not by a vigorous protest (June 4, 1884):

"The proposal that this Province shall [illegible] permanent of only the swamp lands, together with the grant of $45,000 a year, is not acceptable to this Legislature as

"And this feeling is intensified by the fact that the population of Manitoba is largely composed of settlers from the older Provinces who have been accustomed to enjoy all the [illegible] Provincial Legislatures by the full application of the B.N.A. Act."

[illegible] Sessional Papers, 1884, Vol. 14, Paper No. 104.
[illegible] Sessional Papers, 1884, Vol. 14, Paper No. 81.

in accordance with the equitable claim that this province has always protected to all the lands thereof."[1]

The humiliating result of the conference of December 20, 1907–January 10, 1908, has already been indicated. Premier Roblin was confronted at Ottawa with a bill of natural expenditures in the West from the end of the seigniorary farm down to the future return of the surveys, as well as of moneys granted in augmentation to the Indians. The delegation in despair resorted to the proposal of 1907 that the Dominion pay the province annually five per cent of $10,000,000 in lieu of lands; and the "quality claims" already outlined, completed the discomfiture of the province in the miserably ineffectual attempt to secure from the Dominion Government payment for the lands already disposed of by them within the province and the control, management and sale of the public lands within its limits, for the public uses thereof.[2]

The granting of the authority in lieu of lands was later protested, it has been seen, even by Sir Wilfrid Laurier, on point that the guiding principle in of Confederation with regard to the public domain was "not absolutely departed from in the case of Manitoba."[3] It is apparent, however, that though this may have been true with regard particularly to the lands already permanently alienated from provincial control, the principles at the root of the whole issue were by no means accorded. Even the transfer in 1908 of the remaining lands in the province "to have wholly to its benefit" was based, then

[1] Journals of the Leg. Assembly, Manitoba, 1908, Vol. xvii, Appendix A; Can. Sessional Papers, 1908, Vol. 13, Report for 1908, Interior Department, which gives many of the documents. The question of the unalienated lands was fully discussed at the earlier conferences relative to the claims and Premier Roblin pressed for the same position as the other provinces had taken relative to their lands, as per the terms of Confederation which established them.

[2] Address to Governor General, June 4, 1908, Journals of the Leg. Assembly, Manitoba, 1908, Vol. xvii.

[3] That the provinces were entitled to the public lands as a matter of property is affirmed by the opening words of the proclamation. Sir Wilfrid Laurier to Hon. R. Rogers, October 7, 1911.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

by American soldiers of military life which known under the Act of 1862 as Homestead Lands.

From it is an interesting fact that every little American monument would mean to almost the number of Monuments like of this soldier dead. On the American names the monument from every of the state of the United States which were erected without permission but their duties and obligations in memory of the officers who were promoted by the National Government from other divisions. In the case of these Confederate States, as they were called, Virginia, Tennessee, Maine, West Virginia, etc., although in the Union armies with it not merely Confederate land but also and especially over the public lands which they commanded. In fact this is the same every which would be Maine, which was opposed in 1863 West Virginia came into the Union with full title to public lands as in fact it will be remembered that Maryland came into the Union Confederation with different organization in 1861 and without receiving territorial status under the Constitution. The whole Civil War caused the transfer of this district from the Crown rights of the Confederation Government, and as already pointed out, Britain took to any American opinion which was with peculiar distinction and interest to the whole Canadian period of our history since 1865.

In addition to this vested national public domain in the United States, however, the National Government owned all public lands by purchase, conquest or treaty, a vast area of nearly 1,800,000 square miles at a total cost of just about $20,000,000. These areas were disposed with individual action, and from these territories which were subsequently created and admitted to the Union. It became a principle for the National Government in the administration of these lands that they should be sold, to private citizens, after making liberal grants, however, to actual settlers, veterans' bounty land warrants, to the states for the purpose of internal improvements, railway land grants, swamp lands granted to the several

1861 and according to the Federal Government in 1870; and in many details of administration, survey, etc., the results of American examples; but one looks in vain for such precedents as the State Selection Act, 1861, by which 500,000 acres for the purposes of internal improvements were granted to each State that shall thereafter be admitted into the Union. In the time that American precedents were first reviewed by the Dominion with regard to Manitoba, no fewer than seventeen states had received 7,000,000 acres in this way. Measures like the United States Distribution Acts, the Canal Wagon and Railroad Grants to various states of the Union, the Five, Three and Five per cent. Funds upon the net proceeds of the sales of public lands allowed to many states from the date of admission into the Union, are not in evidence in the case of Manitoba.[1] It was twelve years after attaining provincial status before this province found the Federal Government willing to allow to Manitoba the sum of $10,000 a year, "as is done in U.S.A." in lieu of lands.[2]

Despite the fact that American precedents were more emphasized in 1861 than it would now appear to be convincing, the policy then committed internal currency with Federal Governments at Ottawa for twenty-five years, though not without protest, both federal and provincial, in favor of sounder principles of British procedure. It is necessary in the interests of historical fact to observe that the American

[1] Dominion Documents, 10th Congress, 3rd Session, Vol. VII, p. 141, etc., and [illegible] which [illegible] of all the net proceeds of the sales of public lands in all the States subsequent to December 31, 1841, were to [illegible] and Western, and the States and the Territories to [illegible] Internal Improvement." See Public Domain, 10th Congress, 3rd Session, Executive Document 17, Part 1, p. 1[illegible].

See Public Domain, 10th Congress, 3rd Session, Executive Document 17, Part 1, p. 1[illegible].

[2] Report of Committee of Can. P.C. May 30, 1881. "The attention of the Government has been directed to the [illegible] of the Federal Government to the United States in the [illegible] of such States, and they observe that a [illegible] the public lands in the State under [illegible] Sessional Papers, 1882, Vol. 15, Paper No. 61.

Can. Sessional Papers, 1882, Vol. 15, Paper No. 61.

[illegible] on either the perversion of it avowed by the Canadian Privy Council, 1910-11, received perhaps its most unqualified endorsation for this generation at the introduction of the Alberta and Saskatchewan Bills in 1905:

> "This is a case in which we can go to the United States for precedents. They are situated very much as we are regarding the ownership of lands and the establishment of new states. Wherever a new state has been created in the American Union, the Federal Government has always retained the ownership and management of the public lands . . ."

Beyond a doubt the requirements of the situation in 1905 were very difficult, and sections 20 and 21 of the Alberta and Saskatchewan Acts were advocated, and eventually drafted, as offering the soundest argument with which to appeal both to the people of the new provinces and to the people of the other provinces. The same may perhaps be said of the *Manitoba Boundaries Extension Act* of 1912, when this province was placed upon an equal footing with the two other Prairie Provinces with regard to area and subsidy in lieu of lands.[1] The fact remains, however, that the basis of the subsidy in lieu of public lands in 1905 was necessarily more or less arbitrary, and the Premiers of the three Prairie Provinces (Hon. Messrs. Sifton, Scott and Haultain) in December, 1910, in the attempt to reach a common basis for the perplexing differences of status and development between the three provinces concerned, were forced into a position

> "We know that when Manitoba was brought into the Confederation, that province was not given the ownership of her lands . . . The application was always made in the same way. It was always said by the Government that it was necessary, in order to carry out the settlement that it was necessary to settle the matter. The matter was finally closed in 1890 when the Government of Sir John Macdonald . . . were very careful and clearly the provinces were the owners of that property could not be entertained." Sir Wilfrid Laurier, Hansard, 1905, p. 1481.

> "Everything for the subsidy in lieu of public lands and for the adjustment of all Crown lands, mines and minerals and royalties incident thereto . . . by the Government of Canada for the purposes of Canada."

> "The legislation was intended to place Manitoba on a basis of equality with Saskatchewan and Alberta. So far as I am concerned, the allowance is not much more than this." Sir Robert Borden in Debate, March, January 6, 1913.

which has been completely misunderstood and misinterpreted by other provinces of Canada, as a proposal to retain the money and get the lands into the bargain:

> 'That the financial terms already arranged between the Provinces and the Dominion as compensation for lands should stand as compensation for lands already alienated for the general benefit of Canada, and that all lands remaining within the boundaries of the respective Provinces, with all natural resources included, be transferred to the said Provinces.'[1]

It must be emphatically repeated at this point that the subsidy in lieu of lands in Manitoba was first demanded for lands already alienated (in consideration of the lands within Manitoba appropriated by the Dominion for the building of the Canadian Pacific Railway); that it was supported 'as is done in P.E.I.'; and that from the standpoint of this province the present subsidy will be found to be an altogether inadequate compensation for the resources alienated during the past fifty years by the Government of Canada for the purposes of the Dominion. It will be sufficient here to remark that the proceeds of the railway and Hudson's Bay land sales alone (December 31, 1917) had reached the total of $178,000,000 from the grants made to them from the public domain of the West, and that over 14,000,000 acres still remained to be disposed of. For practical purposes, therefore, the historic claims of this province might be formulated in two general terms as:

> (a) the unrestricted beneficial control of all public lands and natural resources within the boundaries of the province hitherto unalienated;
>
> (b) compensation at a fixed equitable rate per acre for all lands within Manitoba alienated to the Dominion

[1] Premiers' Book, Robin and Allen to Premier Borden, December 28, 1910.

In the futility of any method of determining equitable compensation by balancing Dominion receipts and expenditures from Dominion Lands is shown. Owing to the case of practically all the other alienations the lands have been granted free, while the purposes of the Dominion are attained indirectly in other ways. The railway land grants and free homesteads, and the high per capita customs revenues from new settlers

Bay Company at the transfer and under section 30 of the Manitoba Act by the Government of Canada for the purposes of the Dominion," such compensation to be made by way of annual payments at 5 per cent., and to be reckoned as from the date of alienation, less the amounts received as subsidies in lieu of lands.

SUMMARY

1. Two considerations were chiefly responsible for the agitation for provincial rights over the land, viz., the unfavorable financial burdens for local works on account of the free homestead and immigration policy of the Dominion, and the practice of large grants for railways.

2. Claims of Manitoba (Provincial Feb. 19, 1881) were advanced (a) that a subsidy of $100,000 (the same as in B.C.) be granted in consideration of the lands within Manitoba appropriated by the Dominion for the building of the Canadian Pacific Railway, (b) that the results of the subsidy land shall be handed over to the Province for the purpose of local revenue.

3. The case of P.E.I. ($45,000) was submitted by the Dominion for that of B.C. ($100,000), and the grant was eventually made (1873) as is done in P.E.I. (Report of Committee of Can. P.C.) It may be contended, therefore, that both the original claim in consideration of the lands within Manitoba appropriated for the building of the Canadian Pacific Railway and the grant substituted for it as is done in P.E.I. are based not upon future control of ungranted or waste lands in the Province but upon lands already permanently alienated without regard to the beneficial interest of the community. (Cf. the proposals of Dec. 20, 1869, that the financial terms already arranged as compensation for lands should stand as compensation for lands already alienated for the general benefit of Canada.)

4. 'Swamp lands' were transferred to the province in 1884, but the subsidy of $100,000 in lieu of lands in 1884 was made contingent upon the 'finality clause.' This completed the disemmiture of the province in the attempt to secure payment for the lands already disposed of within the Province and the control, management and sale of the Public Lands within its limits for the public uses thereof.

5. The 'subsidy in lieu of lands' was interpreted even by Sir Wilfrid Laurier as proof that the 'guiding principle' of

retained the ownership and management of the public lands. (Sir Wilfrid Laurier).

18. Basis of subsidy in 1905 and 1912 was more or less arbitrary, but the proposal of December 20, 1918 (present subsidy as 'compensation for lands already alienated') was occasioned by the necessity of reaching a common basis for the perplexing differences of opinion and development between the three provinces concerned.

19. Manitoba's original subsidy in lieu of lands was 'in consideration of lands within Manitoba appropriated by the Dominion for the building of the Canadian Pacific Railway', and even the present subsidy is altogether inadequate for encouragement of new roads for the purposes of the Dominion. Railway and H.B. Co. land sales alone (Dec. 31, 1917) amounted to $178,000,000, and there are 14,000,000 acres left.

17. Claims of Manitoba may thus be stated in less general terms as:

(a) Unrestricted beneficial control of all public lands and natural resources hitherto unalienated.

(b) Compensation at a fixed equitable rate per acre-for all lands within Manitoba alienated to the D.R.C. at the transfer, and under section 10 of the Manitoba Act by the Government of Canada for the purposes of the Dominion; such compensation to be made by way of annual payments at 5 per cent., and to be reckoned as from the date of alienation, less the amounts received as subsidies in lieu of lands.

18. The balancing of Dominion receipts and expenditures from Dominion lands is obviously a futile method of determining equitable 'compensation.' Other alienations have been free grants, the purposes of the Dominion being attained indirectly in other ways. C.P. railway land grants and free homesteads, and the high per capita customs revenues from new settlers.

IX.

BRITISH PRINCIPLES IN THE ANGLO-SAXON: PROVINCIAL OR IMPERIAL?

The half-century of conflict for 'provincial rights' in Manitoba and the antagonism of sound British principles at Ottawa are counterparts of the ugly process which would seem to offer promise of settlement of the 'Natural Resources Question.' With regard to the first, the name of Premier Roblin will always hold a conspicuous and an honourable place. The memorandum drawn up by him in his fight for provincial rights' may be classed among the important state papers of the Dominion. Based not upon changed constitutionalism but upon the practical requirements of the case, the insistent demands for payment for the lands already disposed of . . . within the Province,' and the 'control, management and sale of the Public Lands within its limits, for the public uses thereof,' are in a sense very typical of that amazing practical political instinct among British peoples which raised the whole question of responsible government in the first place and applied the principles then elucidated to all the self-governing provinces and Dominions of the Empire.

Premier Roblin's long contest with Ottawa closed like his own sturdy career in his native province, in a courageous but ineffectual attempt to cope with conditions that were too strong for him or perhaps for any man. For the counterpart of Premier Roblin's work, it is necessary to look to sound constitutionalism at Ottawa; and the outstanding name in this respect is beyond doubt that of Sir Robert Borden himself. It will not be necessary to trace in detail the gradual emancipation of federal policy from the tangle of opportunism and necessity which so long prevailed during the formative period

[1] Address to Governor General, June 9, 1887, Journals of the Legislative Assembly, Manitoba, 1888, Vol. XVI.

of Canadian history after Confederation. The problems which confronted the builders of the Dominion were perhaps as [illegible] as any which have ever been [illegible] in such a [illegible], and it would be altogether [illegible] than just to [illegible] in any way the [illegible] of their [illegible] of their [illegible] in achievement. Beyond a doubt, however, the [illegible] that were found to be necessary were [illegible] than one, and as Lincoln once [illegible] in the American Civil War, constitutional principles must be regarded as having had to [illegible] of it. The [illegible] is [illegible]. The sound and [illegible] constitutionalism which has guided our national destinies [illegible] would appear to be the only line of policy which is capable of [illegible] the [illegible] of Canadian than at home. It is altogether fitting and proper. Indeed there are [illegible] reasons why it would appear to be [illegible] that these two [illegible] should be [illegible] at the same time.

The [illegible] of British principles up to the Conference of [illegible], must be traced very briefly; as briefly in fact as it may be deemed advisable in default of the publication of the documents upon the subject.

At the introduction of the Alberta and Saskatchewan Bills in [illegible], Sir Robert Borden, then leader of the opposition, [illegible] the constitutional principles involved by [illegible] as

[illegible]

[illegible]

[illegible]

already noted, namely the same control over their land as is enjoyed by the people of the older provinces.

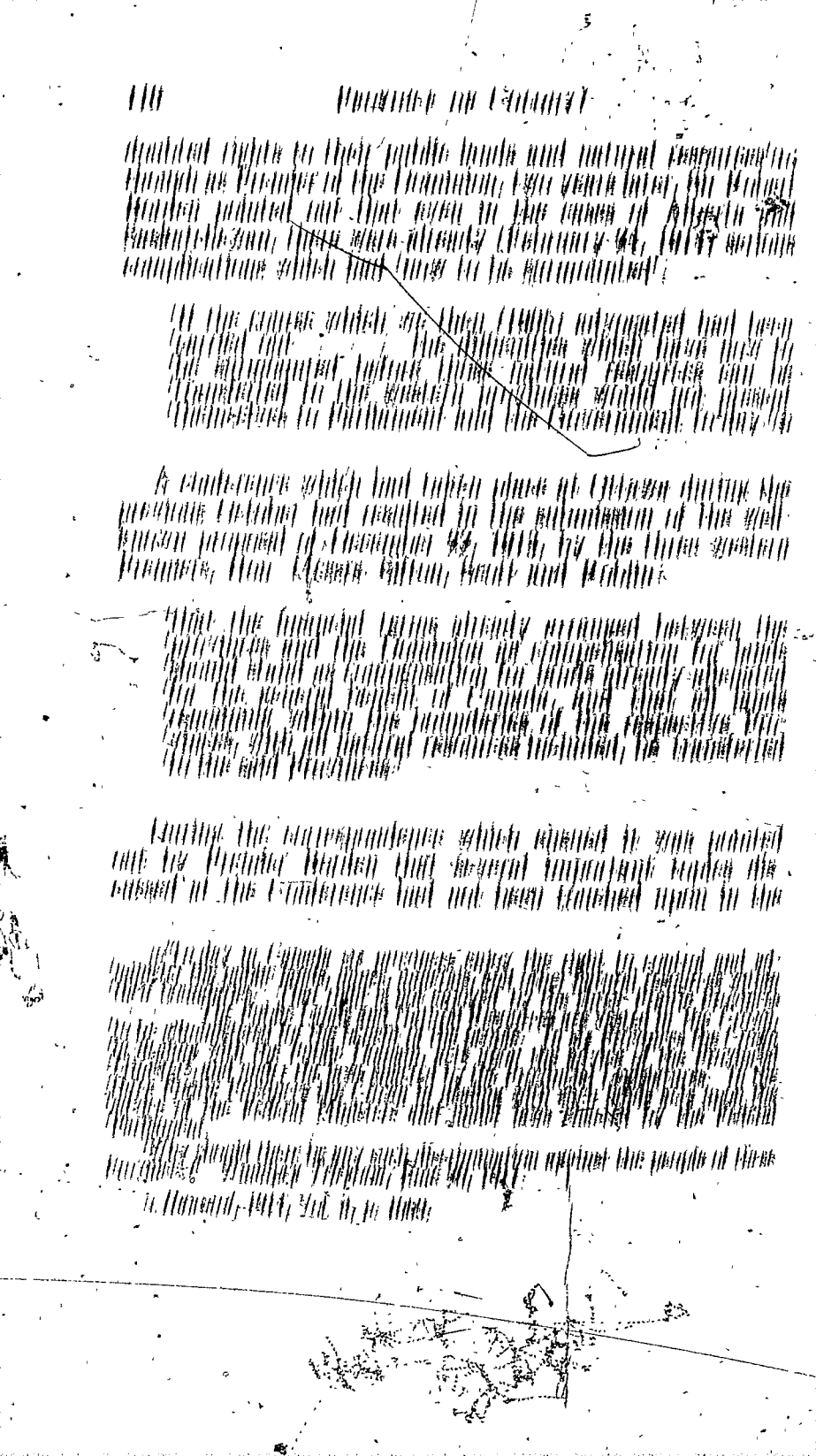
> To Sir Wilfrid Laurier, said it might interfere with the [illegible] of the policy of the government with regard to immigration. So far as the rest of the argument is concerned, it would have justified the retention by the Imperial government up to the present time of every acre of Crown lands in Canada.

With regard to Laurier's pronouncement in 1905 for Imperial control of crown lands in the interests of an Imperial policy of colonization:

> It was then found . . . that it was absolutely impracticable. That is the simple thing to ask [illegible] . . . [illegible] the entire control of the public lands.
>
> So far as the control of the lands is concerned, I adhere to the opinion I have expressed in this House that the people of the northwest, when they are granted provincial rights . . . are entitled to the control of those lands just as much as the people of the older provinces of Canada are entitled to the control of their provincial domain. I see no distinction.

It is well known that Sir Robert Borden advocated in 1905 the restitution of the public lands to the provinces of Alberta and Saskatchewan upon fair terms. Alberta admittedly presented, and still presents, many exceptional features: in the fact that there was no previous territorial status in the exceptionally long period of 'responsible government' without full rights over the land in return; in the comparatively limited resources now available to the province in any case after the lavish alienations of half a century; and in the arbitrary reduction of the province to 'colonial' status by Imperial Act dictated from Ottawa for all purposes whatsoever. In a very closely reasoned statement in Winnipeg, however, in June, 1911, Sir Robert Borden expressed the opinion that all three Prairie Provinces were entitled to the just recognition of their [illegible]

[illegible]
[illegible]



special proposal of December 23, 1913, while the provincial Premiers defended their emphasis upon the financial terms upon the grounds that that proposal had been

"based upon the two fundamental principles which were enunciated by yourself in explaining your policy on this question in Western Canada, and which were approved at the interview: first, the right of the provinces to the ownership of the public domain, and second, their right to compensation for such portions of the domain as have been alienated for the general benefit of Canada." (c)

Premier Borden's reply, dated March 10, 1914, re-affirmed the necessity of including other "fundamental aspects of the subject" in the discussion, and concluded by observing that:

"With regard to these considerations the conditions in the three Provinces are probably not altogether similar, and each of the three Provinces is entitled to have its point of view considered."

Without ever emphasizing here either the obvious difficulties of reaching a uniform, as distinct from an ultimately equitable, basis of settlement for the three provinces concerned, or the advantages which may be found (even from the standpoint of ultimate fiscal equality) by an adherence to the first principle outlined in this memorandum, the remaining matters

(a) At your interview with me on the 30th of October last, the following questions were discussed in connection with the proposed transfer:

1. The readjustment of the financial terms which under the Alberta Act and the Saskatchewan Act and under the Act of 1912 respecting the boundaries of Manitoba were accorded to the [illegible] in lieu of public lands and in compensation therefor;
2. An arrangement with the respective Provinces by which the present settlement with respect to Dominion lands could be retained in force;
3. Other conditions which might be regarded as necessary in dealing with the [illegible] a continued [illegible]

(b) Your letter (Dec. 23, 1913) alludes only to the first of the three subjects then discussed. Premier Borden to Premiers Roblin, Scott and Sifton, March 10, 1914.

(c) Premiers Roblin, Sifton and Scott to Premier Borden, Dec. 23, 1913.

of negotiations in the present time may be outlined very briefly.

With the exception of an interchange of letters in the spring of 1919 with regard to the United States, the Government considered that it was entirely free to adopt its own course in the matter. It was not until September, 1919, that a further step became necessary on account of delays in the ratification of the Peace Treaty. The Federal Government, however, in the absence of the Federal Council, placed the matter before a Commission of representatives of all the provinces of Canada, with an intimation that

[redacted]

The immediate result of the conference was a resolution by the representatives of all but the Prairie Provinces in the following words:

[redacted]

'bequeathed and the prices of those lands, and objects to 'it the consent of the people of the Northwest Territories.'[1]

Similarly in Sir Robert Borden's reply to the original proposal of Western Premiers on December 24, 1918, two 'aspects of the subject' under consideration are outlined as follows:

'a. An arrangement with the respective Provinces 'for which provisions with respect to boundaries should 'be retained in force or other suitable provisions inserted.

'b. Such additional stipulations as might be con'sidered necessary or desirable for the purpose of ensuring 'conditions that would not militate against a continued 'flow of desirable immigration.'[2]

Now the resolution from the representatives of the other provinces of Canada at the Conference of November, 1918, refers to the proposed transfer of the natural resources to provincial control as favoured by the Dominion 'under certain conditions and restrictions,' and it is submitted that arbitrary 'conditions and restrictions' with regard to the public lands would amount, as Sir Robert Borden himself suggested in 1905, to a concession of 'the principle that the government do not intend to hand them over.' Instead of the province being 'supreme' over its own public domain, 'directly under the Crown as its head,' as the Dominion would still be exercising in Manitoba a 'supervisory' which if applied to other provinces of Canada would be regarded as intolerable. Instead of becoming a full province of the Dominion, Manitoba would still remain a colony; with powers, it is true, somewhat enlarged in practice but with status almost as far removed as ever from the 'first principles' of responsible government and the *British North America Act of 1867*.

For there would seem to be no more fundamental principle in connection with the whole development of local control

'The lands ought to be handed over, but if we are to concede the principle that the government do not intend to hand them over, then in that case the best thing to do was that which I suggested.' *Hansard*, 1908, p. 6007.

[2] Robert Rogers to Premiers Norris, Scott and Gilson, March 10, 1919. *Hansard*, 1908, p. 6007. See notes above.

of the Dominion, as already noted, in the *Manitoba Initiative and Referendum Case*.

over the public domain than the fact that the primary purposes of that local control were local. It will not be necessary to repeat in detail the evidence upon this point. In 1804 the Colonial Office pointed out that 'Colonists of the Anglo-Saxon race look upon the land revenue as legitimately belonging to the community.'(a) The Canadian Privy Council itself deplored the plight of Prince Edward Island in having 'no lands, the proceeds of the sale of which could, as in other British Colonies, be appropriated towards local improvements and the maintenance of Government.'(b) The subsidy of $45,000 to Prince Edward Island 'in lieu of lands' was granted because the province 'enjoys no revenue from that source for the construction and maintenance of local works.'(c) The 'grant of full rights over the lands' was everywhere made, as Keith points out, 'in return for a civil list to a community which believes the Crown of the expenses and obligations of government must be entrusted with the normal resources of the Crown for that purpose.' These instances, taken at random from the evidence already adduced in other connections, could be multiplied if necessary from other sources. As Sir Wilfrid Laurier pointed out in 1911, 'the guiding principle' in Confederation with regard to the public domain was 'that the provinces were entitled to the public lands as a source of revenue to administer to the growing wants of the population in each Province.'(d)

These normal functions of the public domain 'for the purposes of local revenue' have remained for fifty years in Manitoba latent in the unconveyed but 'undoubted rights' of the province to its 'public lands and natural resources.' In fact these have been so long latent that the rest of Canada seems almost instinctively to regard them as vested interests of the Dominion. It is a remarkable fact that while 'school lands'

(a) Correspondence relating to the Surrender of Rupert's Land, 1869, Appendix III, p. 88.
(b) Sessional Papers, 1870, Vol. 5, Paper No. 81, p. 7.
(c) Clause 5 in the terms of union.
(d) Responsible Government in the Dominions, II, 1017.
(e) Sir Wilfrid Laurier to Hon. A. G. Gibson, Aug. 7, 1911.

are supposed to yield revenues for education, and 'swamp lands' (from 1884 to 1913) 'when drained,' as the Canadian Privy Council pointed out, 'are fit for settlement and very valuable,' the most valuable lands of all which are 'immediately fit for settlement and tillage, and likely to be sought by immigrants' to-day still be alienated to free homesteads by Canada 'for the purposes of the Dominion.'

It may be said without much uncertainty that 'the potency of those observations in favor of a continuance of such a policy has passed away.' It would be out of place here to discuss the advantages or disadvantages of the lamented policy of the Dominion, though a very profound modification of opinion with regard to the whole system in both Canada and the United States would not seem to be improbable when all the facts connected with it come to be impartially appraised. It is submitted, however, that some of the richest soil in North America must be regarded as a fiscal asset of the first magnitude to the provinces, and if in addition to the vast areas already permanently alienated from provincial control, that which remains and which ought to be within the beneficial control of the province 'for the purpose of local revenue' is still to be administered 'for the purposes of the Dominion,' the province is entitled to adequate fiscal compensation and to statutory safeguards which will leave full provincial status absolutely unimpaired. This is a case where a return to first principles would seem to be imperative. Free lands producing no revenues, rapid immigration producing educational and social problems of the first magnitude—these from the standpoint of the province are the 'sunny side' of Dominion policy which it must be 'the task of good statesmanship,' as Sir Robert Borden has observed, to forestall and alleviate.

The other feature of the Natural Resources Question which invites comment is of equal moment, though it is more difficult perhaps, to discuss it with equanimity. The reference of the

[1] See Wilfrid Laurier to Hon. A. L. Sifton, Aug. 7, 1911, Sifton, A. L. Sifton to Sir Wilfrid Laurier, March 20, 1911, with reference to the liberal features of the free homestead system, etc., in the Order in Council of May 26, 1908.

'Natural Resources Question' to a 'Conference of representatives of all the Provinces' by a purely provincial capacity would seem to leave the fiduciary obligations of the Dominion in administering the public domain of the Prairie Provinces to be determined by the other provinces of Canada on the basis of their own fiscal expediency. Acquiescence on the part of the Premiers of the Prairie Provinces would 'virtually establish an admission on our part that the other Provinces have a right to share in the beneficial interest in our public domain.'[a]

It is possible that much of the hostility to the historic claims of Manitoba to full 'provincial rights for provincial status' has arisen from a misconception of the nature of provincial claims and even of the basis of past and existing subsidies 'in lieu of lands.' The resolution of 1918, already quoted, would seem to be particularly unfortunate in this respect. The transfer of the natural resources hitherto unalienated 'under certain conditions and restrictions' would imply the continuation of an intolerable federal 'suzerainty' over this province. At the Conference of November, 1918, 'the representatives of the following provinces, namely: Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia' contended that 'in the event of the special allowances in lieu of lands' (provided by the *Alberta* and *Saskatchewan Acts* and the *Manitoba Boundaries Extension Act*) 'being maintained in whole or in part, a proportionate allowance calculated on the basis indicated in the said Acts be granted to each of the other provinces of Confederation.' A calculation 'on the basis indicated in the said Acts' is scarcely possible in the case of these provinces because the calculation of 1905 was based upon the estimated value ($67,500,000) of the public domain withdrawn from provincial control 'for the purposes of Canada.'[a] The provinces of Ontario, Quebec,

[a] Premiers Norris, Martin and Stewart to Sir Thomas White, Nov. 10, 1918.

[a] The basis of section 20 of the *Alberta and Saskatchewan Acts* was outlined as follows by Sir Wilfrid Laurier: 'As the public lands in the said provinces are to remain the property of Canada, there shall be paid by Canada to the said provinces annually by way of compensation therefor a sum based upon the estimated value of such lands, (namely $67,500,000) the same being assumed

Nova Scotia, New Brunswick and British Columbia have enjoyed full beneficial control of their public domain since the granting of responsible government. As already pointed out, the original subsidy in lieu of lands in Manitoba was demanded 'in consideration of the lands within Manitoba appropriated by the Dominion for the building of the Canadian Pacific Railway,' and was granted 'as is done in Prince Edward Island.'

Similarly the compensation demanded for the 'school lands of the West would constitute not only an implicit denial to the former Provinces of their 'undiminished rights to their public lands and natural resources' but a truly ironical penalty upon the Dominion Government for qualifying that denial even in the uncertain interests of education. It must be admitted also that the reservation of 'any special claim . . . upon any other ground whatsoever' for adjustment 'at the same time as the lands and natural resources are transferred to the provinces of Manitoba, Saskatchewan and Alberta' has a certain elastic comprehensiveness about it which appears to be well calculated to defy any attempt at evasion.

Turning, however, from the 'Conference of the representatives of all the Provinces of Canada' in November, 1918, the issue would appear to be simplified in one important respect at least by the official views elsewhere expressed by the Provinces of the Maritime Provinces. With regard to the proposal of Premiers Hilton, Bent and Beddis (December 22, 1918), transmitted by the Federal Government, Premier Pierce of

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

New Brunswick expressed the opinion:

> 'As to the wisdom of these three prairie provinces having handed over to them the public lands is a question between the Federal Government and the provinces interested and affected, and I do not wish to express any opinion in relation to that question.'

Similarly Premier Murray of Nova Scotia, though protesting against the retention of 'both the lands and the money' by the Prairie Provinces as 'an entire disturbance of the financial arrangement between the various provinces', conceded the fact that the public domain of the West was not the concern of the other provinces of Canada in their provincial capacity:

> 'I recognize the fact that the question of the wisdom of giving the provinces the lands is one between the Dominion Government and the western provinces.'[1]

Now it cannot be too strongly emphasized that the 'Natural Resources Question' is not two questions but one. It is not a question of lands and a question of subsidy but a question of public lands and public lands only as from the date of the assumption of the duties and obligations of responsible government. It is submitted that there is no justification for interpreting the compensation for natural resources alienated for half a century 'by the Government of Canada for the purposes of the Dominion' as a species of cash subsidy like that 'for the support of the Government and Legislature' or the 10s per capita grant to the provinces in return for the surrender of customs revenues to the Dominion. In a very real sense the compensation for alienated resources is not a subsidy at all. It is the equity due to this province from a usurpation which took place fifty years ago. It is part and parcel of the public domain as from 1870: nothing more and assuredly nothing less. In that sense even the 'two fundamental principles' cited by the three Western Premiers in defence of their proposal of December 22, 1918, are found to be in essence but one, for the 'right to compensation for such portions of the public domain as have been alienated for the general benefit of Canada' is but a corollary to the clear-cut and convincing challenge of

[1] Statement by the Premier Borden, Hansard, Feb. 21, 1919, p. 1000, et seq.

Sir Robert Borden in inaugurating the ascendancy of British as distinct from American principles in 1905:

> 'The people of the northwest, when they are granted 'provincial rights . . . are entitled to the control 'of these lands just as much as the people of the eastern 'provinces of Canada are entitled to the control of their 'provincial domain. I see no distinction.'(1)

In conclusion it may be submitted, with all respect, that with the opinion as expressed above by Premier Fleming of New Brunswick and Premier Murray of Nova Scotia, the Prairie Provinces will be found to be in complete agreement.

It is a remarkable coincidence that the 'Natural Resources Question' should culminate in this two hundred and fiftieth anniversary of the granting of the Hudson's Bay Charter, the hundredth anniversary of the death of Selkirk—whose work of settlement in the West may be regarded as the one vested interest which withstood American expansion westward and northward during the nineteenth century—and the fiftieth anniversary of the entrance of Manitoba into Confederation: the quarter-millennium of the thing which made this western country British, the centenary of the thing which kept it British and the jubilee of the thing that made it Canadian.

It is altogether fitting that this should be, for the settlement of the 'Natural Resources Question' is a Canadian problem altogether much more fundamental than the nice adjustment of subsidies or the liquidation of all possible provincial 'claims' against the Federal Government. It is nothing less than the consummation of Confederation itself—a process which is necessary within the Dominion before the Dominion can take its rightful place among the autonomous British nations of the Empire. The only thing that would seem to be comparable to it in this respect is the projected Union of

(1) *Hansard*, 1905, p. 2020.

the Maritime Provinces; but whereas 'Maritime Union' would be a superstructure to Confederation, a piece of constructive statesmanship inspired by a vision of the future, the 'Natural Resources Question' is a flaw in the very cornerstone of Confederation, aggravated and complicated by half a century of wrong.

It is seldom that a definite principle has been more carefully safeguarded in constitutional legislation than full provincial 'rights over the land' in the *British North America Act* of 1867. There is perhaps no more distinctive feature of that great measure, for as Lord Durham remarked more than eighty years ago, 'the function of authority most full of good or evil consequences has been the disposal of public land.' These functions were committed deliberately to the separate provinces. By the provisions of section 146 of the *British North America Act* of 1867, even the subsequent admission of British Columbia, Prince Edward Island, Newfoundland, Rupert's Land, and the North-western Territory was made 'subject to the provisions of this Act.' There is no 'function of authority' in which the province as such is more conspicuously 'supreme' and 'directly under the Crown as its head.' Indeed there is a sense in which the provincial control of the public domain served an even more fundamental purpose. It is more than the cornerstone of Confederation. It was part of the foundation, the very bed-rock upon which the whole edifice was built, for without responsible government and its first corollary, the 'grant of full rights over the land,' the provinces which entered into Confederation in 1867 would never have been in a position to aspire to a British and transcontinental Dominion.

Now while it is seldom that a great principle has been so discerningly built into the foundations of a nation, it is doubtful if a parallel can be found to the half-century of devious expediency during which this fundamental principle has remained in abeyance in the case of Manitoba. Beyond a doubt this Province has been the Cinderella of Confederation; it has been her misfortune for fifty years to sit among the ashes and aspire only to the commonplace rights and privileges of the

more fortunate provinces of the Dominion. She inherited from the Red Insurrection an unenviable prejudice from the rest of Canada that was as meaningless as it was unjust. Within her boundaries for fifty years have been fought out the bitter controversies of Quebec and Ontario. The very 'school clause' of the Manitoba Act was devised 'according to the system of the Province of Quebec.' Railway communications east and west were a by-product of the terms of union with British Columbia, and the public domain was withheld because the Canadian Pacific Railway 'must be built by means of the land through which it had to pass.'

With regard to 'land revenues' it was twelve years before any local concessions were made to alleviate the poverty in that respect which had been imposed upon the province 'for the purposes of the Dominion.' 'Land revenues' elsewhere were the normal function of the public domain in rapidly developing communities. With millions of acres of the richest soil in North America within her boundaries, this province was starved in the midst of plenty. Even in 1885 the grant of $15,000 'in lieu of lands' was made 'as is done in Prince Edward Island.' The sum of $100,000 to which the subsidy in lieu of lands was increased in 1869 had been suggested by the case of British Columbia for the 'railway belt' through the Rocky Mountains transferred 'in trust' to the Dominion.

In default of convenient British precedents with regard to the land, the public domain of Manitoba was administered in accordance with American, or the perversion of American precedents which had been superseded seventy-five years ago in the British Empire by the practice of responsible government. The Dominion has done to Manitoba what the Government of the United States has never done to the smallest 'land State' of the Union, and the Government of the United States has done to all the 'Land States' of the Union what George III never contemplated for Massachusetts.

[illegible] list of lands upon which the discussion upon the Manitoba Bill were based." Archbishop Taché's Letter to the Winnipeg Free Press, Dec. 31, 1889.

Had the Dominion instead of the Province of Ontario obtained the services of Sir Oliver Mowat, the boundaries of Manitoba would almost undoubtedly have included a litigant to take exception to the Ontario boundaries dispatch of the eighties. When the boundaries of the provinces were extended in 1912, the northern boundary was determined by the case of Alberta and Saskatchewan in 1913. Even in 1912 the boundaries of Ontario and Quebec had to be so generously extended also that the Maritime Provinces have lodged claims for compensation for which it is proposed to secure equal privacy with the half-century of provincial rights over the land in Manitoba. It must be admitted that in the 'railway strip' to Port Nelson which was granted also to Ontario through Manitoban territory in 1912, there is a refinement of this traditional policy for which it would be difficult to find a parallel. 'Chartered territory' which could not be entrusted to the beneficial control of Manitoba because it had been 'purchased' by the Dominion from the Hudson's Bay Company, is granted to Ontario not as 'unwanted or waste lands' under beneficial control within its own boundaries but as property in full ownership within the boundaries of Manitoba. At the same time the old subsidy to this province (in consideration of the lands within Manitoba already granted by the Dominion for railway purposes) and the 'swamp lands' the use mainly of municipalities of provincial rights over the land' were conferred by this province were surrendered in order to 'place Manitoba on a basis of equality with Saskatchewan and Alberta.'[1]

It is submitted that the time has come to right this half-century of vested wrong by an Imperial amendment to the British North America Acts which shall leave this province like the other provinces of the Dominion 'supreme' over its own lands 'directly under the Crown as its head.' Instead of aspiring to the accommodation rights and privileges of more fortunate states and provinces 'as is done in Prince Edward Island,' 'according to the system of the province of Quebec,'

[1] Dominion Election in Province Lands, Jan. 6, 1913

as was done in British Columbia, as was said to obtain in the United States of the American Union, it would not be unfair to consider the 'Natural Resources Question' upon the merits of the case of this province. Let it be repeated that this can be done only by a resolute adherence to 'true principles.' The grand constitutionalism which has guided so judiciously the relationships of the Dominion within the Empire is confronted within the Dominion itself with a problem which will require for its solution the most signal contribution to the constitutional structure of Confederation since the original conditions under the British North America Act of 1867 'subject to the provisions of this Act' were alternated by the Manitoba Act almost exactly fifty years ago. 'The Natural Resources Question' may thus be said, without false modesty, to constitute one of the most important problems of the Dominion. Its settlement would set the seal of full provincial status under the British North America Act of 1867 upon three Canadian 'colonies,' and would enable the Dominion, with its hands in order, to move forward unhampered among the British nations of the Empire and the other nations of the world.

SUMMARY

1. Sound constitutionalism of Ottawa is the necessary counterpart of the 'right but provincial rights' (Premier Norquay in Manitoba). It is fitting and necessary that relationships within the Empire and abroad, and the anomalies of Confederation at home, should be settled at the same time and by the same methods.

2. The precedents of British principles become definitely traceable since the Alberta and Saskatchewan Acts. Any denial against provincial control of the public domain would have nullified the retention by the Imperial government up to the present time of every acre of Crown Lands in Canada. 'The people of the northwest when they are granted provincial rights ... are entitled to the control of these lands' (Sir Robert Borden).

3. 'The application of the public lands to the purposes of Alberta and Saskatchewan upon fair terms' was advocated in 1907, 'the final recognition' for the Prairie Provinces 'of their

undoubted rights to their public lands and natural resources in 1911; though by February, 1914, serious and complicated difficulties . . . have now to be surmounted.'

4. On December 22, 1918, the three western Premiers had submitted their proposal:

> 'that the financial terms already arranged between the provinces and the Dominion as compensation for lands should stand as compensation for lands already alienated for the general benefit of Canada';

and subsequently urged in its defence 'two fundamental principles' already conceded, (a) the right of the provinces to the public domain, (b) 'their right to compensation for such portions of the same as have been alienated for the general benefit of Canada.' (Premiers Scott, Dillon and Martin.)

5. The 'Resources Question' was then overshadowed by the war until the Conference of November, 1918, which it was submitted to 'representatives of all the provinces of Canada' in their provincial capacity, with the intimation that 'the Government was disposed to give favourable consideration . . . provided that it was mutually satisfactory to the other Provinces of the Dominion.'

6. A resolution of 'the other Provinces of the Dominion' demanded:

> 'that in the event of the special allowances in lieu of lands . . . being maintained in whole or in part, a proportionate allowance . . . be granted to each of the other provinces of Confederation reserving however any special claim . . . upon any other ground whatsoever.'

7. Pending a return to normal federal channels the 'Natural Resources Question' would seem to have been swamped in the tides of inter-provincial controversy whence ghosts of unlawful claims seek in vain for deliverance.

8. Two fragmentary features of the 'Resources Question' challenge attention, (a) the suggestions of 'certain reservations' in connection with the return of the public domain to the Prairie Provinces, and (b) the intervention of other provinces in a purely provincial capacity in the 'Resources Question' of the West.

9. With regard to the former, any arbitrary 'conditions and restrictions' with regard to lands would amount to a concession of the principle that the government do not intend

to hand them over. Instead of the provinces being entrusted with their own public domain already under the Crown as the head, the Dominion would still be exercising an independent authority.

10. The primary functions of the public domain are local. Crown lands are those lands upon the land revenue of which primarily belonging to the community. (Colonial Office.) It is land the proceeds of the sale of which would, as in other British Colonies, be appropriated towards local improvements and the maintenance of government. (Hon. Peter Campbell.) The guiding principle in establishing with regard to the public domain was that the provinces were entitled to the public lands as a source of revenue to administer to the growing wants of the population in each Province. (Sir Wilfrid Laurier.)

11. These manual functions of public lands (unappropriated even in this province to school lands, swamp lands, etc.) were deputed to Manitoba with regard to millions of acres of some of the richest lands in North America. The Prairie Provinces are entitled to adequate compensation if the old system is to be continued, and to statutory subsidies in any case equalling full provincial status without any qualifications whatever.

12. The reference of the 'Resources Question' to the 'respective legislatures of all the provinces' is more difficult to discuss with equanimity because it would seem to leave the statutory obligations of the Dominion in administering the public domain of the Prairie Provinces to be determined by the other provinces of Canada on the basis of local expediency; and acquiescence would virtually establish an admission on our part that the other Provinces have a right to share in the beneficial interest in our public domain. (Premiers Harris, Martin and Sifton.)

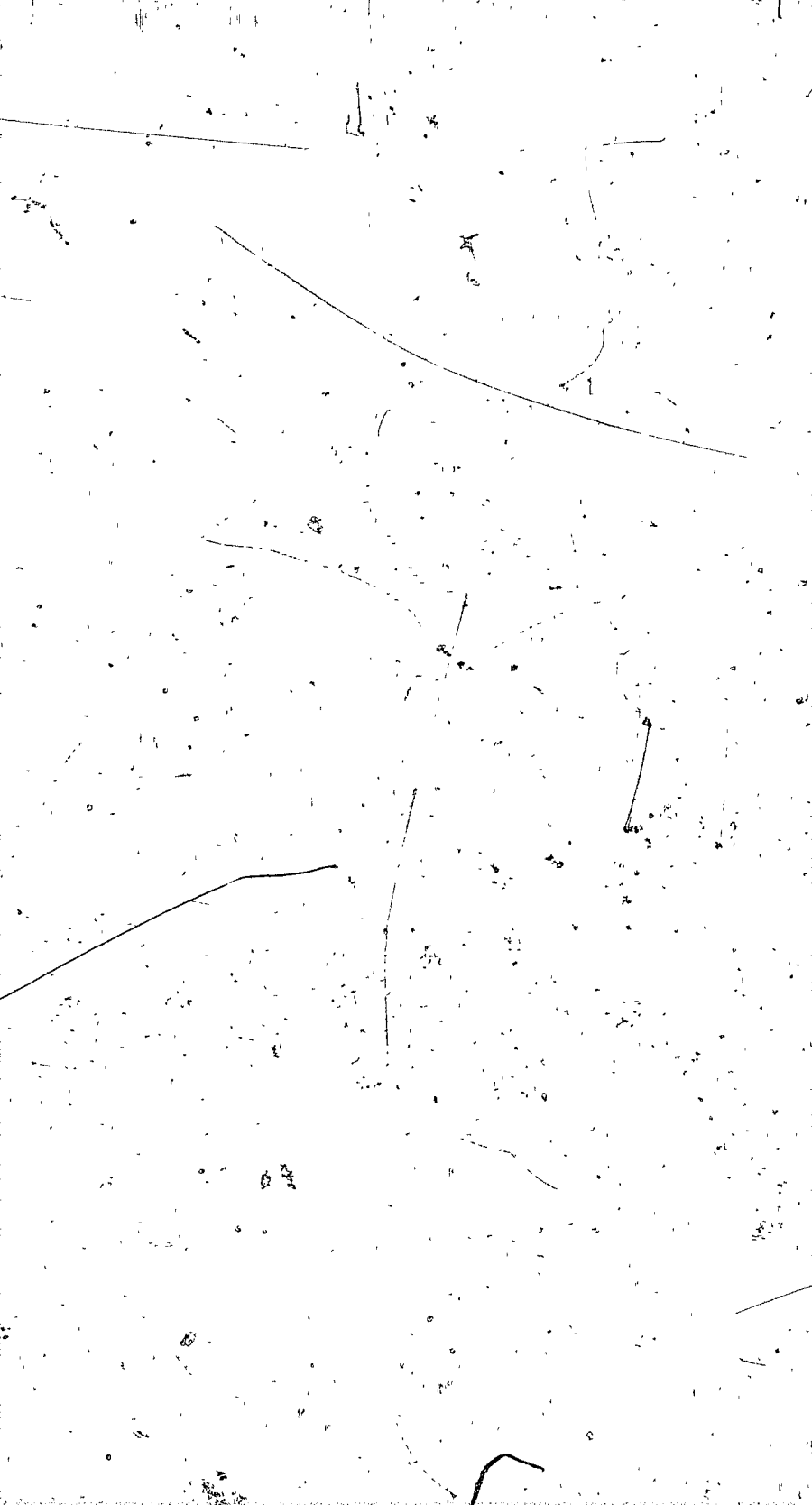
13. "The Natural Resources Question" is not two questions but one. It is not a question of lands and a question of subsidy, but a question of lands as from 1871. The Resources Question is one question and the Federal Government alone could legally introduce Compensation for alienated lands is thus the equity due by the provinces in respect of lands as from the inauguration of responsible government.

14. "The solution of these three Prairie Provinces having limited areas in which the public lands is a question between the federal Government and the provinces interested and affected." (Premier Flemming of New Brunswick.) "The question of the

system of giving the provinces the lands in the Interior the Dominion Government and the western provinces. (Premier Minister of Prince Edward)

16. This is a problem not of adjusting existing rights or treaties but of creating rights, but of negotiating the Confederation. Original control of public lands was the prerogative, the foundation of the B.N.A. Act of 1867, and the first corollary of responsible government. In this respect Manitoba has been the pattern of Confederation; accordingly obtained by treaty that same ownership taken for granted, as it is done in U.S., as was done in B.C., as was said to be the fatal obstacle of the American Union. It would not be unfair to settle the natural resources question upon the merits of the case of this province.

17. The time has come to right this half-century of wrong, and by Imperial statute to confer this province upon the other provinces of the Dominion, ownership over its own lands already under the Crown in its hand.



APPENDIX.

GENERAL SUMMARY.

I. INTRODUCTION: THE NATURE AND SCOPE OF THE INQUIRY.

1. A very representative convention at Fort Garry (February, 1870) claimed among the terms of proposed union with Canada 'full control of all the public land' for the Local Legislature. Similar claims were advanced on at least three other occasions by less representative sections of the community during the process of transfer of Rupert's Land to Canada. The provincial control of the public domain has been advocated almost continuously for fifty years.

2. The principles underlying this claim, however, are much older than the Province of Manitoba or the Dominion of Canada. The public domain has always been, and still remains, in title 'vested in the Crown' which is 'one and indivisible throughout the Empire' (*Lord Haldane in P.C.*); but two questions with regard to it, viz. (*a*) the administration of the same, and (*b*) the beneficial interest therein, were long in dispute until both were unreservedly conceded to self-governing provinces upon their undertaking the duties and obligations of 'responsible government.'

3. The claims of Manitoba are in exact conformity with this double principle as applied to the period of her status as a Canadian province since 1870, viz. (*a*) the unrestricted control of natural resources hitherto unalienated, and (*b*) ample recognition of full beneficial interest not only in those but in those already alienated by 'the Government of Canada for the purposes of the Dominion.'

4. The issue, therefore, is as fundamental as was the control of crown lands, the 'clergy reserves,' etc., in Upper Canada over eighty years ago. In fact it is largely the same issue: whether Manitoba is a 'colony' or a province of the Dominion.

5. The principles then established have been applied everywhere to self-governing provinces under 'responsible government': to the Maritime Provinces and to 'Canada' long before Confederation; to Newfoundland and New Zealand

and the provinces of the Australian Commonwealth) to all the original provinces of the Canadian Confederation as safeguarded by the *B. N. A. Act*, 1867, section 109; to British Columbia and Prince Edward Island which have since entered Confederation; to all the self-governing provinces and Dominions of the Empire, in fact, but the Prairie Provinces of Canada.

6. The present inquiry, therefore, may be simplified by outlining at the outset the range of historical evidence to be examined in the following sections:

(II.) *British Principles with Regard to the Public Domain*, as established in Canada at 'responsible government.'

(III.) The conditions determining *The Surrender of Chartered Rights in Rupert's Land and the Transfer to Canada in 1870.*

(IV.) The circumstances of *The 'Transfer' and Provincial Status for Manitoba* in 1870.

(V.) An examination of *British Principles and Canadian Practice in British Columbia* in 1871.

(VI.) A similar examination of *British Principles and Canadian Practice in Prince Edward Island* in 1873.

(VII.) An outline in humiliating contrast with British practices elsewhere of *Federal Policy and Provincial Poverty in Manitoba after 1870.*

(VIII.) A discussion of the 'subsidy in lieu of lands' in 1883 and the federal revival of *American Precedents for a British Province.*

(IX.) An outline of the return to sound British constitutional principles and their application to the present 'Natural Resources Question': *British Principles in the Ascendant: Province or Colony?*

II. BRITISH PRINCIPLES WITH REGARD TO THE PUBLIC DOMAIN.

1. The claim to (*a*) the administration of the public domain, (*b*) the beneficial interest therein, formed an integral part of the conflict for 'responsible government' in Canada.

2. Both these functions were definitely conceded more than seventy-five years ago to provinces under 'responsible govern-

ment,' Imperial beneficial control being definitely renounced by statute (15 & 16 Vic., c. 80 and 17 & 18 Vic., c. 118), both functions, therefore, were implicit in provincial status for all the original provinces of Canada.

8. When these provinces united to form Confederation these rights were confirmed in *B.N.A. Act*, 1867, s. 109.

9. Similarly in Newfoundland, New Zealand, the provinces of the Australian Commonwealth, the same principles are uniformly in operation. 'Colonists of the Anglo-Saxon race look upon the land revenue as legitimately belonging to the community.' (*Colonial Office*, 1864, *re* Rupert's Land).

10. 'The plan adopted in every case of the grant of responsible government . . . took the form of a grant of full rights over the lands in exchange for a civil list' (*Keith*), viz., a compact involving the grant of the beneficial control of the public domain in return for undertaking the obligations of self-government. Manitoba has discharged the duties of 'responsible government' with full 'civil list' since 1870 and has been denied for fifty years 'full rights over the lands in exchange.'

11. Even Lord Durham's proposals with regard to Imperial control of crown lands for purposes of scientifically directed colonization were still-born in Canada, and the only alternative was that 'the whole control of the property should be vested in the most ample and unconditional manner in the Colonial Legislature. This is required by every principle of justice.' (*Buller*).

12. 'The constitutional rights which the original provinces of Confederation now seek to deny to the Prairie Provinces in the twentieth century are the same rights which they themselves vindicated, even against Lord Durham, during the first half of the nineteenth. The arguments employed against the provincial rights of the Prairie Provinces would have justified the retention by the Imperial government up to the present time of every acre of Crown Lands in Canada.' (*Sir Robert Borden* in 1905).

13. In respect of public lands, Manitoba is still a 'colony' of the Dominion, with this difference for the worse, that whereas the crown lands before 'responsible government' were administered by residents of the province 'for purely colonial purposes and for local or personal objects' (*Buller*) those of Manitoba are administered, by Dominion statute, by the Government of Canada for the purposes of the Dominion.

the Crown and this was the only part of either transaction involving compensation of any kind.

A Charter of whole [illegible] was not to perpetuate proprietary administration for the purposes of the Dominion but that the old Proprietary Rights etc. of the Company would be absolutely extinguished (Rupert's Land Act) in order to expedite settlement as a part of the British Colonial System. (Canadian Office)

6. The transfer from the Crown to Canada by Order in Council [illegible] was to [illegible] with all constitutional [illegible] [illegible] by the Company to the Crown and the Charter [illegible] to the Canadian Government are Acts of State authorized by Imperial Statute, and will have all the force and permanence of fundamental law. (Canadian [illegible])

7. The [illegible] was [illegible] by [illegible] by the [illegible] [illegible] to be [illegible] in [illegible] [illegible]

[illegible]

[illegible]

[illegible]

coming directly to Canada from the Crown by cession under *B.N.A. Act*, 1867, section 146, and without even the fictitious appearances of preliminary 'purchase' This is clear from the correspondence of the Colonial Office at the time of the *Rupert's Land Act*, the attitude of the Canadian Government, etc

6 Mainland district of British Columbia already created (1858) out of 'licensed' territory in same relationship to H B C as 'North-Western Territory', yet full beneficial control of public domain was vested in B C in 1871.

6 Similarly, districts from the 'chartered' territory of Rupert's Land were added both to Ontario and to Quebec, with full beneficial control vested in these provinces, despite so-called 'purchase' by Canada in 1870. Even within boundaries of Manitoba, Ontario was granted property rights over 'railway strip' to Port Nelson at the *Manitoba Boundaries Extension Act* of 1912

7 Manitoba, Saskatchewan and Alberta appear to be the only provinces of Canada which cannot be entrusted with beneficial control over either the 'licensed' or 'chartered' territory of the H B C ceded to Canada in 1870

8 By the constitutional procedure scrupulously followed in the transfer, therefore, both Rupert's Land and the North-Western Territory came to Canada not from the H B C by 'purchase' but from the Crown by 'Acts of State, authorised by Imperial Statute' with 'all the force and permanence of fundamental law'

9 In 1871, British Columbia (see Chapter VI) received full beneficial control over public domain, both 'licensed' area ceded in 1858 and Vancouver Island which had been repurchased from the H B C in 1867 for £57,500. It is submitted that Manitoba is entitled to the same fundamental rights as from 1870, 'as a part of the British system'

B THE 'TRANSFER' ACTS PROVIDED FOR EQUAL RIGHTS FOR MANITOBA

1 The *Manitoba Act* provided that upon transfer to Canada by Imperial Order in Council, Manitoba should be 'one of the Provinces of the Dominion of Canada'. In the case of this province, therefore, there has been no preliminary period of territorial status, and British principles thus apply with pending urgency and directness to the whole Canadian period of our history since 1870

2 The documents of the Red Insurrection and the

motives under which provincial status was sought and secured in the *Manitoba Act* long inspired an unenviable and rather undiscriminating prejudice against this province.

5. With regard particularly to the beneficial control of the public domain, the conduct of Riel in 1870 has penalized the rest of the province for fifty years. 'They wished to have all the lands ... as in other Provinces. The land could not be handed over to them ... A large Province ... might interfere with the general policy of the Government ... The land legislation of the Province might be obstructive to immigration.' (*Sir John A. Macdonald in debate on Manitoba Bill*)

6. The *Manitoba Act* was based on a secret 'list of rights' which remained generally unknown to the inhabitants of Manitoba for nineteen years. Both the British and Canadian authorities refused to regard the *Manitoba Act* as 'subject to confirmation by the "Provisional Government" which would have involved a re-cognition of Riel and his associates.' (*Sir Clinton Murdock*) Manitoba was unique, therefore, among the provinces of Canada in that many of the terms of union and particularly those relating to the public domain were imposed upon the inhabitants of this province and only without their consent but even without their knowledge.

7. Section 30 providing for the administration of 'All ungranted or waste lands ... by the Government of Canada for the purposes of the Dominion' was unique even among the provisions of the *Manitoba Act*. 'To confirm for this colonial' (of the 'control of all the lands of the North-west') the Manitoba Government gave to the children of the half-breed inhabitants ... one million four hundred thousand acres of land, which had not been asked for.' (*Archbishop Taché*) With this removal of opposition to federal control of provincial lands, no precautions were taken to safeguard for the future the territorial rights of Manitoba as a British and Canadian province.

8. It is noteworthy that the provisions in the *Manitoba Act* relating to the public domain contained every expression of opinion, both English-speaking and French, in every list of rights drawn up during the process of transfer. 'Full control of all the public land for the Local Legislature' had been stipulated by the Convention of February, 1870, even upon the basis of territorial status.

9. Whatever the requirements of the hour may have been, therefore, with regard to the temporary control of the public domain of the Province in 1870, the indefensible

phrase 'for the purposes of the Dominion' in the Manitoba Act must be regarded as an unwarranted and deliberate violation of fiduciary obligations on the part of the Dominion. The repetition of this phrase in the Saskatchewan Act, the Alberta Act, and even in 1912 in the Manitoba Boundaries Extension Act would seem to indicate in the [illegible] and most unmistakable terms the definite 'colonial' subjection of the Prairie Provinces.

[illegible]
[illegible]

1. Vancouver Island was granted to the Hudson's Bay Company by Letters Patent of January 13, 1849 and was [illegible] in the Imperial Government on April [illegible] [illegible]

2. The Imperial control of Vancouver Island [illegible] and appropriated by the British Government as the public domain of Manitoba was appropriated [illegible] without [illegible], in that [illegible] to Canada for the purposes of the Dominion.

3. There was no attempt to indemnify the British Government [illegible] for administering the land for the purpose [illegible] Great Britain, while Canada [illegible] control of the [illegible]

[illegible]

[illegible] British Columbia was created [illegible] which had formerly been [illegible] of the Hudson's Bay Company, corresponding to the North-Western Territory of the Prairie Provinces.

4. The two distinct [illegible] which were united in [illegible] under the name of British Columbia comprised Vancouver Island and the North-Western Territory, [illegible] of the Hudson's Bay Company.

[illegible] of the terms of union that [illegible] for the introduction of responsible

government was desired by the inhabitants of British Columbia. [illegible] the Address pursuant to B.N.A. Act, 1867, section 146, had to be passed by legislative council which was then for the first time predominantly elective (nine out of fifteen members).

7. British Columbia thus acquired control of public domain and beneficial interest therein before being accorded [illegible] or even fully representative government. Manitoba acquired [illegible] of responsible government fifty years ago and has been denied ever since both functions with regard to the public domain.

8. Upon entering Confederation, B.C. acquired almost automatically the beneficial control of public domain. The [illegible] specifically [illegible] in the [illegible] of union, and British principles thus prevailed with the first provisions for the introduction of responsible government.

9. Even the railway belt for the transcontinental railway [illegible] by B.C. as the price of union was transferred to Canada in trust at an annual payment of [illegible]. This subsidy, therefore, must be regarded as the interest on the capital [illegible] value [illegible] of lands thus administered in trust by Canada for the purposes of the Dominion.

10. Within this category, it is submitted, must be [illegible] the subsidy in lieu of lands first granted to Manitoba in [illegible] during the [illegible] of the C.P.R. The lands [illegible] by Canada in Manitoba since 1870 have been administered [illegible] "for the purposes of the Dominion" and ought to be [illegible] the [illegible] lands of British Columbia upon a similar [illegible] basis.

VI. [illegible]
[illegible]

1. In [illegible] British Columbia [illegible] British [illegible] the public domain [illegible] responsible government.

2. The [illegible] public domain [illegible]

(a) [illegible] of £10,000 per annum (still paid since the Inland Government had lost their Crown lands and consequently [illegible] no revenue from that source for the construction and maintenance of local works,

(b) a loan from the Dominion not to exceed $[illegible] at 4 per cent per annum for the purchase of lands now held by large proprietors.

7. It is seen, therefore, that the Dominion in whom the beneficial control of the alienated lands of the Inland had not hitherto vested, and in whom, therefore, no purchase money in respect of land have been paid (£[illegible]) [illegible] agreed hereto to pay £[illegible] an annual subsidy in lieu of the lands thus granted by the Crown and in default of revenue from that source for local works. This subsidy represents a capital sum of $[illegible] in excess of that originally allowed by Canada [illegible] for ghurry and declared by [illegible] as not sufficiently liberal.

8. With regard to the other clause of the question, the settlement of the land issue, the principle adopted by the Dominion enabled the Inland to expropriate the proprietary holdings under the terms of the Land Purchase Act of 1870 and its amendments. Those expropriated lands became ultimately crown property, public domain, existing during the twenty one year period [illegible] which does not include the most productive coast area than the total capital sums advanced by the Dominion.

9. The Dominion therefore supplies the requisite territorial interest of the province to [illegible] alienated land without the necessary other than that of the community, the other holds the right in the beneficial control of the public domain still available. Both provisions are seen to be in conformity with sound financial principles already outlined as adopted in provincial states since the [illegible] of responsible government.

10. In [illegible] the only obstacle to perfect equity [illegible] the Dominion Government [illegible] these had been made by the Crown [illegible] before the period of responsible government, [illegible] allowances have been made in the [illegible] provincial estate by the Government of Canada for the [illegible] of the Dominion [illegible] the subsidy of [illegible] in lieu of lands [illegible] the Province only [illegible]

condition that government be 'simplified and cheapened by the abolition of the second Chamber.'

9. Subsidy of $100,000 per annum 'in lieu of lands' was demanded in 1881 'in consideration of the lands within Manitoba appropriated by the Dominion for the building of the Canadian Pacific Railway'; pending a decision the Dominion advanced $60,000 at 5 per cent on debt account to meet 'the immediate necessities of the Province.'

10. Subsidy of $15,000 was granted in 1882 'as is done to P.E.I.' and 'intended to close any negotiations on that subject for the next ten years.'

11. Increased subsidy of $100,000 in 1885 was made contingent upon 'finality clause' which has left a sense of humiliation deeper even than 'disallowance' and 'the monopoly clause' of the C.P.R. upon the political traditions of the province.

VIII. AMERICA'S CONTRIBUTION FOR A NATIONAL PROVINCE

1. Two considerations were chiefly responsible for the initiation of 'financial rights over the land', viz., the inalienable financial burdens for 'local works' on account of the free homestead and immigration policy of the Dominion, and the practice of lavish grants for railways.

2. Claims of Manitoba (*Memorandum*, Feb. 19, 1881) were advanced (a) that a subsidy of $100,000 (the same as in B.C.) be granted 'in consideration of the lands within Manitoba appropriated by the Dominion for the building of the Canadian Pacific Railway', (b) that 'the residue of unpatented land shall be handed over to the Province for the purpose of local revenue.'

3. The case of P.E.I. ($45,000) was substituted by the Dominion for that of B.C. ($100,000), and the grant was eventually made (1886) 'as is done in P.E.I.' (*Report of Committee of Con. C.*) It may be contended, therefore, that both the original claim 'in consideration of the lands within Manitoba appropriated for the building of the Canadian Pacific Railway' and the grant substituted for it 'as is done to P.E.I.', are based not upon future control of 'unpatented or waste lands in the Province' but upon lands already permanently alienated without regard to the local interest of the community. Cf. the proposals of Dec. 23, 1869, that the financial terms already arranged as compensation for lands should stand as compensation for lands already alienated for the general benefit of Canada.'

4. 'Swamp lands' were transferred to the province in 1884, but the subsidy of $100,000 in lieu of lands in 1886 was made contingent upon the 'finality clause'. This completed the disenfranchisement of the province in the attempt to secure payment for the lands already disposed of within the Province' and the 'control, management and sale of the Public Lands within its limits, for the public uses thereof.'

5. The 'subsidy in lieu of lands' was interpreted even by Sir Wilfrid Laurier as proof that the 'guiding principle' of Confederation in respect of lands was 'not absolutely departed from in the case of Manitoba.' The principles at the root of the whole matter, however, were not conceded, and the Dominion met the demand 'that the residue of unGranted land shall be handed over to the Province for the purposes of local revenue' by one of the most astonishing avowals in Canadian constitutional history.

6. "The whole of Manitoba was acquired by purchase and thus became the property of the Dominion, and stands really in the same position as lands in the Territories of the United States, which are not given to new States but remain the property of the United States." (*Report of Committee on P.C.*, approved March 7, 1882)

7. "The Government purchased at a large price in cash, all the rights in and to the territory out of which the Province of Manitoba has been formed, it incurred, further, a very large expenditure to obtain and hold this territory in peaceable possession, and in extinguishing Indian titles and maintaining the Indians, so that the Dominion Government has a very large pecuniary interest in the soil.

"The expenditure in construction (C.P.R.) and in cash subsidy, may be regarded as an advance, to be repaid from the lands.

"It ("the Federal Government of the United States") rightly retains the public lands of the State except those it may appropriate for specific purposes, allotting to the State only swamp lands.

"It is expedient to recommend to Parliament a modification of this arrangement." (*Report of Committee of P.C.*, approved May 10, 1884)

8. This avowal of Angevine precedent was defended by federal administrations both Conservative and Liberal until

1911, though even under the American system the evidence would seem to support the claims of Manitoba.

9. A fundamental difference exists between the British and American systems. In the British Empire title to all public domain is 'vested in the Crown'; and whatever may be the difference of opinion with regard to purely statutory or legal rights of the Dominion, the constitutional or political rights of the Empire in the beneficial interest in the public domain and ultimate control thereof would seem to be unimpeachable. Statutory powers of the Dominion, therefore (altogether apart from the way these were acquired), must be regarded as fiduciary in character and intermediary, under responsible government, between the Crown and self-governing provinces where full beneficial control must ultimately be vested.

10. In the United States, each separate state became, at independence, the 'successor to the Crown and colony in the ownership of the unappropriated and vacant lands' in a way which has no parallel in the British Empire.

11. The nucleus of the national 'public domain' of the United States originated in cessions to the National Government with full sovereign title, of over 400,000 square miles of hinterland by seven of the thirteen states. It is not on record that the other provinces of Canada have ceded territory to form 'Dominion Lands.'

12. The States (Maine, Vermont, Tennessee, West Virginia, Kentucky, etc.) organized without previous territorial status out of this ceded 'public domain' received full sovereign title and ownership of the lands within their boundaries. Manitoba came into Confederation as a province without previous territorial status, and her territory had been 'ceded' by the Crown, by 'Acts of State, authorized by Imperial Statute', with 'all the force and permanence of fundamental law', long after the principles of responsible government with all its implications had been everywhere conceded.

13. Even Texas, annexed in 1845, received as a state without previous territorial status, the full title to public lands; and though the districts from the 'Louisiana purchase,' etc., were organized after varying periods of territorial status into 'Land States', with the public domain still vested in the National Government, measures like the *State Selection Act*, the *Distribution Act*, the 'Canal Wagon and Railroad Grants' to various states, the 'Two, Three and Five per cent. Funds', etc. are not in evidence under the American system as

applied by the Dominion to Manitoba. The U.S. Government was represented (*Committee of P.C.*, May 30, 1884) as 'allotting to the State only swamp lands.' Even these were taken away from Manitoba in 1918.

14. Unreserved avowals of American principles were made as late as 1905, at the *Alberta and Saskatchewan Bills*. 'This is a case in which we can go to the United States for precedents . . . Whenever a new state has been created in the American Union, the Federal Government has always retained the ownership and management of the public lands.' (*Sir Wilfrid Laurier*).

15. Basis of subsidy in 1905 and 1918 was more or less arbitrary, but the proposal of December 29, 1918 (present subsidy as 'compensation for lands already alienated') was occasioned by the necessity of reaching a common basis for the perplexing differences of status and development between the three provinces concerned.

16. Manitoba's original 'subsidy in lieu of lands' was the consideration of lands within Manitoba appropriated by the Dominion for the building of the Canadian Pacific Railway; and even the present subsidy is altogether inadequate for resources alienated for fifty years 'for the purposes of the Dominion.' Railway and H.B. Co. land sales alone (Dec. 31, 1917) amounted to $178,000,000, and there are 14,500,000 acres left.

17. Claims of Manitoba may thus be stated in less general terms as:

(*a*) Unrestricted beneficial control of all public lands and natural resources hitherto unalienated.

(*b*) Compensation at a fixed equitable rate per acre for all lands within Manitoba alienated to the H.B.C. at the transfer, and under section 80 of the *Manitoba Act* by the Government of Canada for the purposes of the Dominion; such compensation to be made by way of annual payments at 5 per cent., and to be reckoned as from the date of alienation, less the amounts received as subsidies in lieu of lands.

18. The balancing of Dominion receipts and expenditures from Dominion lands is obviously a futile method of determining equitable 'compensation.' Chief alienations have been free grants, 'the purposes of the Dominion' being attained indirectly in other ways. Cf. railway land grants and free homesteads, and the high per capita customs revenues from new settlers.